

# TRANSCRIPT OF RECORD.

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1911.

No. 88.

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GAAR, SCOTT & COMPANY, PLAINTIFFS IN ERROR,

v.  
O. K. SHANNON.

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ON WRIT TO THE COURT OF CIVIL APPEALS FOR THE THIRD  
SUPREME JUDICIAL DISTRICT OF THE STATE OF TEXAS.

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FILED JULY 16, 1909.

(21,751.)

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*vs.*

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*Caption.*

THE STATE OF TEXAS,  
*County of Travis:*

At a term of the District Court of the Twenty Sixth Judicial District of Texas, begun and holden at Austin, within and for the County of Travis, before the Honorable V. L. Brooks, and which adjourned on the 4th day of May, A. D., 1907, the following case came on for trial, towit:

No. 24067.

GAAR, SCOTT & COMPANY  
VS.  
O. K. SHANNON.

*Plaintiff's Original Petition.*

Filed May 31, 1906.

STATE OF TEXAS,  
*County of Travis:*

In District Court, 26th Judicial District, Travis County, Texas, October Term, A. D. 1906.

To the Honorable V. L. Brooks, Judge of said Court:

Your petitioner, the Gaar, Scott & Company, complaining of O. K. Shannon, hereinafter styled defendant, respectfully alleges and shows that your petitioner is a private corporation, duly incorporated under and by virtue of the laws of the State of Indiana, that your petitioner has its domicile and principal place of business in the City of Richmond, in the County of Wayne, State of Indiana, and that your petitioner has now and has continuously for a long time prior hereto towit, since on or about May 23rd, 1901, had a permit to do business in the State of Texas, and that the defendant resides in Travis County, State of Texas. And for cause of action your petitioner alleges and shows the following:

2 1. That heretofore, towit, on or about the 23rd day of May, A. D. 1901, a permit was granted your petitioner, under the General Laws of Texas, to do business in the State of Texas, as a private foreign corporation for pecuniary gain and profit for a period of ten years by the Secretary of State of the State of Texas, and that your petitioner on said date last mentioned paid to the said Secretary of the State of Texas, all fees required of it for its said permit to do business in the State of Texas by the general laws of said State of Texas then in force.

2. That after said permit had been granted to your petitioner and paid for, as aforesaid, your petitioner received a notice from the Sec-

retary of the State of Texas, on or about March 3, A. D. 1905, notifying your petitioner by a printed notice or circular issued out of the office of said Secretary of State, to the effect that the Legislature of the State of Texas had passed and put into force a purported act, known as Chapter 19 of the General Laws of the State of Texas passed by the Twenty-Ninth Legislature of the State of Texas at its regular session, A. D., 1905, and that your petitioner would be required to pay as a private foreign corporation the tax imposed by said purported act of the Legislature of the State of Texas to the Secretary of State of the State of Texas by the first day of May, A. D. 1905, and that on failure of your petitioner to pay to said Secretary of State said tax by the 1st day of May, A. D. 1905 it would be and become liable to pay a penalty of twenty five per cent of the amount of the tax sought to be imposed upon it by said purported act of the Twenty-Ninth Legislature of the State of Texas, for the year beginning May 1, 1905, and ending May 1st, 1906, and that if the amount of said tax and penalty was not paid by your petitioner by the first day of July thereafter, its said permit to do business in the State of Texas, would be forfeited and canceled by the said Secretary of

State without judicial ascertainment, and that after such forfeiture, your petitioner would be deemed an outlaw and denied not only the right to do business in the State of Texas, but also the right to either sue or defend in any of the courts of the State of Texas, and also the right to set up or ask any affirmative relief on all causes of action accruing to it prior to such forfeiture. That at the time of the passage of the purported act of the Twenty-Ninth Legislature of the State of Texas, said purported act being Chapter 19 of the General Laws of the State of Texas, passed by said Twenty-Ninth Legislature at its regular session, A. D. 1905, your petitioner had a large amount of debts owing to it by residents and citizens of the State of Texas, a large portion of said debts were not due and payable until long after May 1, 1905 and July 1st, 1905. And your petitioner further alleges that the said Twenty-Ninth Legislature of the State of Texas passed at its regular session A. D. 1905, another purported act, known as Chapter 72 of the Twenty-Ninth Legislature of the State of Texas, A. D. 1905, and that said purported law attempted to provide and prescribe how the tax sought to be imposed by the purported act known as Chapter 19 of the Twenty-Ninth Legislature should be computed, and to declare certain acts of corporate officers to be a misdemeanor. That in order to prevent the Secretary of the State of Texas from attempting to impose and exact said penalty of twenty five per cent of the amount of said tax sought to be imposed by said purported acts of the Twenty-Ninth Legislature of the State of Texas on your petitioner, and to prevent the said Secretary of State from declaring your petitioner's permit to do business in the State of Texas forfeited, and thereby deprive it not only of the right to thereafter do business in the State of Texas, but also of its right to sue or defend in any of the courts of said State of Texas and of being allowed any affirmative relief on any cause of action accruing to it prior to such forfeiture prescribed and provided in said

4       purported acts of the Twenty-Ninth Legislature of the State of Texas, your petitioner paid to O. K. Shannon, on or about April 28, 1905, the sum of Two Hundred and Eighty Seven Dollars (\$287.00) as a tax imposed by said purported acts of the Twenty Ninth Legislature of the State of Texas upon your petitioner for the year beginning May 1, 1905, and ending May 1, 1906; that the said O. K. Shannon, at the time the payment of the said sum of Two Hundred & Eighty-seven Dollars (\$287.00) was made by your petitioner to him, as aforesaid, claimed to have the right and authority as Secretary of the State of Texas, to exact the payment of said sum of money and to receive the same from your petitioner, and to impose and enforce the penalties prescribed and provided by said purported acts of the Twenty-Ninth Legislature of the State of Texas, and that in order to prevent the said O. K. Shannon from adjudging and declaring without judicial ascertainment or intervention that your petitioner was liable for the said twenty five per cent penalty prescribed by said acts of said Twenty-Ninth Legislature, as aforesaid, and also to prevent him from declaring and adjudging without judicial ascertainment and intervention, that your petitioner's permit to do business in the State of Texas was forfeited and canceled, and that it was no longer entitled to either sue or defend in any of the courts of the State of Texas, or to ask affirmative relief on any cause of action accruing to it prior to said forfeiture and cancellation of its permit to do business in the State of Texas by the said O. K. Shannon, as aforesaid, your petitioner did pay to the said O. K. Shannon the sum of Two Hundred & Eighty-seven Dollars (\$287.00) on or about April 28th, 1905, under duress and under protest; that your petitioner protested against the payment by it of said sum of Two Hundred & Eighty-seven Dollars (\$287.00) to the said O. K. Shannon at the time it paid same to him upon the ground that the said purported acts of the 29th Legislature of the State of Texas, under which the said O. K. Shannon held that your petitioner was

5       liable to pay said sum of Two Hundred & Eighty Seven Dollars (\$287) as a tax, were illegal and void as in contravention of the Constitution of the State of Texas, and of the Constitution of the United States. And your petition-further alleges that at the time it paid the said O. K. Shannon the said sum of Two Hundred & Eighty-seven Dollars (\$287) as aforesaid, that it not only paid same under protest as aforesaid, but that it also then and there notified him in writing that it reserved the right to and would institute suit to recover said sum of Two Hundred & Eighty-seven Dollars (\$287) from him, and that its said protest and notice were in writing and substantially as follows:

"We beg to advise you that we pay this tax under protest, on the ground that the franchise tax law of your State is in violation of the Constitution of the State of Texas, also in violation of the Constitution of the United States, and it is, therefore, void. We consider that this franchise tax is illegal, and we reserve the right to recover back the amount we have paid in the event that it shall be decided that the law is unconstitutional, and that the tax was illegally imposed."

And your petitioner further alleges that its capital stock On May

1st, 1905, was the sum of Four Hundred Thousand Dollars (\$400,000) and that it had then on hands a surplus of property of Seven Hundred and Thirty-seven Two Hundred & Eleven Dollars and twenty cents, and that said sum of Two Hundred and Eighty-seven Dollars (\$287) paid by it to O. K. Shannon, as aforesaid, was exacted by him from your petitioner as a tax due from your petitioner on said capital stock and surplus under said purported acts of the Twenty-Ninth Legislature of the State of Texas.

3. And your petitioner further alleges that heretofore, to wit, on or about April 30th, 1906, it paid to the said O. K. Shannon, the further sum of Two Hundred and Eighty-eight Dollars (\$288) as tax under said purported acts of the Twenty-Ninth Legislature of the State of Texas, for the year beginning May 1, 1906, and ending May 1, 1907, in order to prevent the said O. K.

6 Shannon from adjudging and declaring, without judicial ascertainment or intervention, your petitioner liable for the said twenty five per cent penalty on the amount of tax claimed by him to be due by your petitioner under said purported acts of the 29th Legislature of the State of Texas, for the year beginning May 1, 1906, and ending May 1, 1907, and also to prevent him from adjudging and declaring without judicial ascertainment or intervention, your petitioner's permit to do business in the State of Texas, forfeited and canceled, and thereby attempting to deprive it, not only of the right to do business in Texas, without judicial ascertainment or intervention, but also the right to sue or defend in any of the courts in the State of Texas, and from asking or seeking affirmative relief on any cause of action in the courts of Texas accruing to it prior to said forfeiture. That your petitioner also paid the sum of Two Hundred & Eighty-eight Dollars (\$288) under protest in writing against the payment of the same to him at the time said payment was made, and that at the time of paying the said sum of Two Hundred & Eighty-eight Dollars (\$288) to him it protested against paying the same to him, upon the ground that said purported acts of the Twenty-Ninth Legislature of the State of Texas, were illegal and void as in contravention of the Constitution of the State of Texas and of the Constitution of the United States; and plaintiff further alleges that it notified the said O. K. Shannon at the [time] it paid said sum of Two Hundred and Eighty-eight Dollars (\$288) to him as aforesaid, that it reserved the right to and would institute suit against him to recover from him the said sum of Two Hundred & Eighty-eight Dollars (\$288) and that its said protest and notice were in writing and substantially as follows:

"We beg to advise you that we pay this tax under protest, on the ground that the franchise tax law of your state is in violation of the Constitution of the State of Texas and also the Constitution of the United States, and it is, therefore, void. We reserve the right to recover back the amount of taxes we have paid in the event that it shall be decided that the law is unconstitutional."

7 And your petitioner further alleges that its capital stock on May 1, 1906, was the sum of Four Hundred Thousand Dollars (\$400,000) and that its surplus of property then on hand was the sum of Seven

Hundred Fifty Three Thousand one Hundred and Eighty Dollars, and that said sum of Two Hundred and Eighty-eight Dollars (\$288) paid by it to the said O. K. Shannon, as aforesaid, was exacted by him from your petitioner as the tax due from your petitioner on its said capital stock and surplus under said purported acts of the Twenty-Ninth Legislature of the State of Texas.

1. Your petitioner alleges that it is a corporation engaged in business at Richmond, Indiana, in the manufacture and sale of threshing machinery, portable traction engines, saw mills and clover hullers, and that its office and principal place of business is located in Richmond, in the county of Wayne in the State of Indiana, and that it only transacts an interstate business in the State of Texas in the sale of its manufactured products. That it employs at Dallas and Houston, Texas, agents who solicit and superintend the soliciting of orders for the goods manufactured by it at Richmond, Indiana, which orders are taken by such agents or persons, subject to the approval of your petitioner's officers at Richmond, Indiana, and that this applies to all goods sold by your petitioner in the State of Texas, and your petitioner further alleges that it was at the time its permit was granted to it to do business in the State of Texas, as aforesaid, and that it now is and has been ever since said permit was granted to it engaged in an interstate commerce business protected by paragraph three, section eight of Article 1 of the Constitution of the United States.

8 5. Your petitioner further alleges that the acts of March 1, 1905, and of April 11, 1905, of the Twenty-Ninth Legislature of the State of Texas, said acts being Chapters 19 and 72 of the General Laws of the State of Texas, of 1905 are and each of them is unconstitutional and void, because said purported acts attempt to impose unjust and illegal burdens and taxes upon foreign corporations, which have obtained a permit to do business in the State of Texas, and because said purported acts make an unjust and unreasonable discrimination between domestic and foreign corporations in the amount of taxes levied and assessed against said respective kinds of corporations. That said acts and each of them are illegal and void in that they attempt to impose a tax on property not within the state and on property in which the State has no control, and penalties upon officers of corporations not within the State. That said acts are and each of them is in contravention of Article 8, Section 1, of the Constitution of the State of Texas, which provides among other things that all taxes shall be equal and uniform. That said acts are and each of them is in violation of Article 8, Section 2, of the Constitution of the State of Texas, which provides among other things that all occupation taxes shall be equal and uniform on the same class of subjects; that said acts make an unjust and unreasonable discrimination between domestic and foreign corporations and place a heavier burden upon foreign corporations organized for the same kind of business as domestic corporations, notwithstanding such foreign corporation is not engaged in business within the State of Texas; that said acts of March 1, 1905, of the Twenty-Ninth Legislature of the State of Texas, said Act being Chapter 19 of the Gen-

eral Laws of the State of Texas of 1905, is in violation of section 35, Article 3 of the Constitution of the State of Texas, providing that no bill, except the appropriation bills shall embrace more than one subject and which shall be expressed in its title, and that said act of April 11, 1905, of the Twenty-Ninth Legislature of the State of Texas, being Chapter 72 of the General Laws of 1905, is also in violation of section 35, Article 3, of the Constitution of the State of Texas, that said acts of the Twenty-Ninth Legislature of 1905, known as Chapters 19 and 72 are and each of them [is] in violation of section 16, Article 1 of the Constitution of the State of Texas, providing that the Legislature of the State of Texas shall not pass any law impairing the obligation of contracts. That said act of March 1, 1905, and known as Chapter 19 of the General Laws of 1905, is void and unconstitutional, because it attempts to delegate judicial authority to the Secretary of the State to adjudge and declare forfeitures and fix penalties for failure to comply with said act. That said acts of the Twenty-Ninth Legislature of the State of Texas of March 1, 1905 and April 11, 1905, known as chapters 19 and 72 are and each of them — in violation of paragraph 3, section 8 of the Constitution of the United States which provides that Congress shall have power to regulate commerce with foreign nations among the several states and with the Indian tribes in that it attempts to impose a tax upon and discriminate against goods manufactured in a foreign state, which goods are subject to the protection of said paragraph 3, section 8 of the Constitution of the United States; that said acts are and each of them is in violation of paragraph 1, section 10, of the Constitution of the United States, which provides among other things as follows that no state shall pass any bill of attainder, ex post facto law, or law impairing the obligation of contracts; and that such acts are and each of them is in violation of section 1 of the 14th Amendment of the Constitution of the United States which provides among other things that no state shall make or enforce any law which shall abridge the privilege or immunities of the citizens of the United States. Nor shall any State deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of law. Wherefore, your petitioner says that both and each of said acts of the Twenty-Ninth Legislature of the State of Texas, is unconstitutional and void and conferred upon the defendant no right power or authority to demand and receive from plaintiff said sums of money as a tax or otherwise. And your petitioner further alleges that defendant wrongfully and illegally demanded and received said sums of money from your petitioner to its damage in the sum of Five Hundred & Seventy five Dollars (\$575) together with legal interest thereon from the respective dates that *de* demanded and received said sums of money as aforesaid.

And your petitioner further says that said Chapter 19 of the General Laws of the 29th Legislature of the State of Texas is unconstitutional and void, because it was not read on three several days in each house of said Legislature nor passed by a four-fifth-vote of each

of said houses of said Legislature as required by Section 32, article 3 of the Constitution of the State of Texas.

6. Your petitioner further alleges that it not only paid said sums of money to the said O. K. Shannon under protest, as heretofore alleged, but that it paid the same to him under duress and for the purpose of preventing him from declaring its permit forfeited, imposing the penalties provided in said acts of the Twenty-Ninth Legislature of the State of Texas and jeopardizing its right to sue and defend in the courts of Texas; and plaintiff further alleges that said sums of money were illegally and wrongfully demanded by the said O. K. Shannon from it, and that he was without right, power or authority to demand and receive said sums of money from your petitioner, and that the same were by him illegally and wrongfully taken from your petitioner, and that the same were received

11 by him for an illegal and wrongful purpose, and your petitioner further alleges that by reason of the illegal and wrongful acts of the said O. K. Shannon as heretofore alleged, he has become and is liable to your petitioner for each of said sums of money paid to him by it, together with legal interest thereon from the respective dates of each of said payments, and that your petitioner has been damaged in the sum of Five Hundred and Seventy Five Dollars (\$575) with legal interest thereon, as aforesaid, by reason of the said wrongful and illegal acts of the defendant, and though plaintiff has demanded the return of said sums of money to it, by the said O. K. Shannon, he has failed and refused to return the same or any part thereof and still fails and refuses to return the same or any part thereof to plaintiff's damage in the sum of Five Hundred and Seventy Five Dollars (\$575) with legal interest thereon.

Wherefore, premises considered, your petitioner prays that the said O. K. Shannon be cited to answer this petition, and that upon final hearing it have judgment against him for the sum of Five Hundred and Seventy Five Dollars (\$575) together with legal interest thereon; said interest to be computed on Two Hundred & Eighty-seven Dollars (\$287) of said sum of Five Hundred and Seventy Five Dollars (\$575) from the 28th day of April, A. D. 1905, and on Two Hundred and Eighty-eight Dollars (\$288) of said sum from the 30th day of April, 1906, together with all costs of court in this behalf incurred; and for such other general and equitable relief as it may be found entitled to either in law or equity.

J. M. PATTERSON,  
BUCKLEY, GRAY & MORE,  
*Attorneys for Plaintiff.*

(Endorsed:) No. 24067. Gaar, Scott & Company vs. O. K. Shannon. Plaintiff's Original Petition. Filed May 31st, 1906 in District Court of Travis County, 26th Jud. Dist. Jas. P. Hart, Clerk.

12

*Answer of Defendant.*

Filed Oct. 2, 1906.

In the District Court of Travis County, 26th Judicial District of Texas, October Term.

No. 24067.

GAAR, SCOTT &amp; COMPANY

VS.

O. K. SHANNON.

Now comes O. K. Shannon, Secretary of State of the State of Texas, defendant in the above styled and numbered cause, and appearing herein only for the purpose of presenting this, his exception, says:

The petition of plaintiff does not allege nor charge that defendant threatened or proposed, or intended to perform, or performed, any wrongful act or trespass against plaintiff or its property, or did any act whatever other than enforcing the law of the State of Texas, in behalf and in the name of the State of Texas, as an officer of the State of Texas, and in strict pursuance of the terms and provisions of said law.

Wherefore, defendant says that while said State of Texas is not a nominal party to the suit, and while he is not sued as an officer of the State of Texas, still, the State of Texas is the real party to this suit, and, therefore, he should be held exempt from this action, and the petition of plaintiff should be dismissed; and of this he prays the judgment of the court.

R. V. DAVIDSON,

*Attorney General;*

CLAUDE POLLARD,

*Assistant Attorney General,**For Defendant.*

13 And only in the event that the foregoing exception be overruled, then the defendant:

Demurs to plaintiff's petition filed herein, and says that same is insufficient in law, and shows no cause of action, such as entitled plaintiff to the relief or the judgment prayed for; and of this he prays the judgment of the court.

R. V. DAVIDSON,

*Attorney General;*

CLAUDE POLLARD,

*Assistant Attorney General,**For Defendant.*

And only in the event that the foregoing exception and demurrer be overruled, then the defendant:

Denies all and singular the allegations in plaintiff's petition con-

tained and asks that he be held to strict proof of same; and of this he puts himself upon the country, and prays judgment that he may go hence with his costs in this behalf incurred.

R. V. DAVIDSON,  
*Attorney General;*  
CLAUDE POLLARD,  
*Assistant Attorney General,*  
*For Defendant.*

(Endorsed:) No. 24,067. Gaar, Scott & Company vs. O. K. Shannon. Answer of Defendant. Filed Oct. 2nd, 1906. Jas. P. Hart, Clerk.

14

*Judgment.*

March 7th, 1907.

No. 24067.

GAAR, SCOTT & COMPANY  
vs.  
O. K. SHANNON.

And now on this the 7th day of March, A. D. 1907, this cause came on regularly to be called as per previous setting thereof when came all the parties, plaintiffs and defendant, by their respective attorneys and thereupon came on to be heard the defendant's general demurrers to plaintiffs' petition, and the same, after being duly argued and submitted and being fully understood, were by the court sustained and plaintiffs declining to amend;

It is ordered and adjudged by the court that this cause be and the same is hereby now dismissed, and that the plaintiff Gaar, Scott & Company, pay all costs in this behalf expended for all which let execution issue.

To all of which action and ruling of the court the said plaintiff, Gaar, Scott & Company in open court excepted and in open court gives notice of appeal to our Court of Civil Appeals, for the Third Supreme Judicial District of Texas at Austin.

15

*Appeal Bond.*

Filed April 3, 1907.

In 26th District Court, Travis County, Texas.

No. 24067.

GAAR, SCOTT & COMPANY  
vs.  
O. K. SHANNON.

Whereas, in the above numbered and entitled cause, pending in the 26th District Court of Travis County, Texas, and at a regular

term of said Court, to wit, on the 7th day of March, A. D. 1907, the court sustained the general demurrer and special exceptions of defendant to plaintiff's petition and rendered judgment in favor of the defendant that plaintiff take nothing by its action and the defendant go hence without day with judgment for all costs of court incurred in this behalf against plaintiff, to which action of the court plaintiff then and there in open court excepted and gave notice of appeal to the Court of Civil Appeals of the 3rd Supreme Judicial District at Austin, Texas, from which judgment the said plaintiff, Gaar, Scott & Company, has taken an appeal to the said Court of Civil Appeals of the 3rd Supreme Judicial District, at Austin, Texas, in the County of Travis.

Now, therefore, we, Gaar, Scott & Company, as principal, and National Surety Company as surety, acknowledge ourselves bound to pay O. K. Shannon the sum of Two Hundred Dollars (\$200) conditioned that the said Gaar, Scott & Company, appellant, shall prosecute its appeal with effect, and shall pay all the costs which have accrued in the court below, and which may accrue in the

16 Court of Civil Appeals and the Supreme Court.

Witness our hands this the 30th day of March, A. D. 1907.

GAAR, SCOTT AND COMPANY,

[SEAL.]

*Principal,*

By HOWARD CAMPBELL, *Pres't.*

Attest:

CHAS. H. LANE,  
*Secretary Pro Tem.*

NATIONAL SURETY COMPANY,

[SEAL.]

*Surety,*

By CHARLES E. CRAIN, *Attorney in Fact.*

I have fixed the probable amount of the costs of this suit in the Court of Civil Appeals, the Supreme Court and the Court below at One Hundred Dollars (\$100) and approve the within and foregoing bond, this the 3rd day of April, A. D. 1907.

D. J. PICKLE,

*Clerk of District Court, Travis County, Texas.*

(Endorsed:) No. 24067. Gaar, Scott and Company vs. O. K. Shannon. Appeal Bond. Filed April 3rd, 1907. D. J. Pickle, Clerk.

17

*Assignment of Errors.*

Filed April 30, 1907.

In District Court, Travis County, Texas, 26th Judicial District of Texas.

No. 24067.

GAAR, SCOTT AND COMPANY

vs.

O. K. SHANNON.

## Plaintiff's Assignment of Errors.

Now comes the plaintiff in the above numbered and entitled cause, and on its appeal from the judgment of the court below against it assigns the following errors committed by the court, towit:

## First.

The court erred in sustaining defendant's general demurrer to the petition of plaintiff, because it appears from the face of plaintiff's said petition and the facts alleged therein that a cause of action is stated therein against the defendant.

## Second.

The court erred in sustaining defendant's general demurrer to the petition of plaintiff because it appears from the facts alleged in said petition that the suit was brought by plaintiff to recover moneys which it had paid to defendant under protest and duress and to prevent him from declaring its permit to do business in the State of Texas forfeited.

## Third.

The court erred in sustaining defendant's general demurrer to the petition of plaintiff because it appears from the fact of plaintiff's petition and the facts stated therein that the franchise tax laws of the State of Texas, the same being Chapters 19 and 72 of the General Laws of the 29th Legislature of the State of Texas, are unconstitutional and void, said laws being in contravention of the Constitution of the United States and also of the Constitution of the State of Texas.

BUCKLEY, GRAY & MORE,  
J. M. PATTERSON,

*Attorneys for Plaintiff.*

(Endorsed:) No. 24,067. Gaar, Scott & Company vs. O. K. Shannon. Plaintiff's assignments of Error. Filed April 30th, 1907. D. J. Pickle, Clerk, by E. Huppertz, Deputy.

*Bill of Costs.*

In District Court, Travis County, Texas.

No. 24067.

GAAR, SCOTT &amp; COMPANY

vs.

O. K. SHANNON.

To Officers of Court, Dr.

*Clerk's Costs.*

Docketing Suit .....	\$ .20
Issuing Citations and Duplicates and Recording Returns....	1.75
Entering Appearances.....	.30
Entering Continuances .....	.20
Entering Orders .....	1.50
Filing Papers .....	.45
Entering Judgment .....	1.00
Approving Bond .....	1.50
Brought Forward .....	<u>\$6.90</u>
19 Brought Forward .....	\$6.90
Transcript .....	11.40
Assessing Damages .....	.50
Filing and Certifying Brief.....	.90
Taxing Costs .....	.25
Clerk's Costs .....	<u>\$19.95</u>

*Sheriff's and Miscellaneous Costs.*

Stenographer Fee .....	3.00
G. S. Matthews, Sheriff:	
Citation and Mileage .....	1.00
Venire Fee .....	.50
A. A. Curne, N. P. (estimated).....	6.00
Total .....	<u>\$30.45</u>

*Clerk's Certificate.*

THE STATE OF TEXAS,  
County of Travis:

I, D. J. Pickle, Clerk of the District Court in and for said County and State, do hereby certify that the within and foregoing on 20 pages is a true and correct transcript of all proceedings had in this

Court in Cause No. 24,067, Gaar, Scott & Company vs. O. K. Shannon, as the same appear of record and on file in this office.

Given under my hand and seal of office, at Austin, Texas, this the 8th day of May, A. D. 1907.

[SEAL.]

D. J. PICKLE,

*Clerk District Court Travis County, Texas.*

20 (Endorsed:) No. 4174. Gaar, Scott & Co., Appellant, vs. O. K. Shannon, Appellee. From the District Court of Travis County, for the 26th Judicial District of Texas, at Austin, Texas. Applied for by Buckley, Gray & Moore and J. M. Patterson, attorney-for appellant, on the 30th day of April, A. D. 1907, and delivered to above named attorney J. M. Patterson, on the 8th day of May, A. D., 1907. D. J. Pickle, Clerk of the District Court of Travis County. Filed in Court of Civil Appeals, 3rd Supreme Judicial District, Austin, Texas, Jun- 8, 1907. R. H. Connerly, Clerk.

*Judgment of Court of Civil Appeals.*

Rendered Dec. 16th, 1908.

No. 4174.

GAAR, SCOTT & COMPANY

vs.

O. K. SHANNON.

This cause came on to be heard on the transcript of the record, and, the same being inspected, because it is the opinion of the Court that there was no error in the judgment: It is therefore considered, adjudged and ordered that the judgment of the court below be in all things affirmed, that the appellant, Gaar, Scott & Company, principals, and their surety, National Surety Company, pay all costs in this behalf expended and this decision be certified below for observance.

21 *Opinion of Court of Civil Appeals.*

Delivered December 16, 1908.

No. 4174.

GAAR, SCOTT & COMPANY, Appellants,

vs.

O. K. SHANNON, Appellee.

Appeal from the District Court of Travis County.

*Opinion.*

Appellant instituted this suit against appellee individually to recover the sum of \$575, with interest thereon \$287 of which was

alleged to have been paid by it to him as Secretary of State on or about the 28th day of April, 1905, and \$288 of which was paid to him as Secretary of State on April 30th, 1906, which said amounts were paid as a franchise tax claimed to be due from it to the State by virtue of the acts of the 29th Legislature, pp. 21 and 100, for said years.

The suit was predicated on the contention that said acts of the Legislature under which the tax was collected were and are unconstitutional and void. After all formal requisites were stated, the petition alleged, substantially, that the State in 1901, granted it a permit under the then existing law to transact business within the State for a period of ten years, and that it paid the franchise tax then imposed for said privilege; that thereafter, in the years 1905 and 1906, the Secretary of State, by virtue of the acts of the 29th Legislature, heretofore mentioned, demanded and received from appellant the amounts sued for as a franchise tax for said years; that said tax was so paid by it under written protest, on the ground that said law

was unconstitutional and void, but the point relied upon was not set forth in said protest. The petition, however, asserts the invalidity of said law chiefly upon the following grounds, viz: That having been granted a permit under the laws of 1901, for a period of ten years, and having paid the tax therefor, that the Legislature had no authority by a subsequent act to impose an additional tax, and to do so would be violative of the provision of both the State and Federal Constitutions, which forbid any state to pass any law impairing the obligation of contracts. It further alleged that said law imposed a greater burden upon foreign than upon domestic corporations, and was, therefore, an unjust discrimination as against it in favor of domestic corporations; that the same was an Indiana corporation, doing wholly an interstate business, and was, therefore, not subject to the payment of the franchise tax and was not required to obtain a permit, and to demand the same would be in violation of law. There were other allegations under which it is claimed that said franchise tax was illegal, which we deem it unnecessary to set out.

A general demurrer to this petition being sustained by the court, appellants excepted and gave notice of appeal, so that the only question for our consideration is as to the correctness of the judgment of the trial court sustaining said demurrer.

By its third assignment of error, appellant insists that the court erred in sustaining the general demurrer to its petition because it appeared therefrom that the franchise laws of the State of Texas were unconstitutional and void, being in contravention of the Constitution of the United States and of this State. By its first proposition thereunder it is insisted that said acts impair the obligation of the contract entered into between the State and plaintiff on the 23rd day of May, 1901. The act of the Legislature under consideration provided for

the payment by every foreign corporation heretofore authorized or thereafter authorized to do business in this State, a certain franchise tax, based upon the authorized capital stock of such corporation, providing the time for its payment and

prescribing a penalty of 25% on the amount of the taxes due for failure to pay the same, as well as forfeiture of right to do business in the State, and directing the Secretary of State to declare such forfeiture without judicial ascertainment by entering the same upon a ledger to be kept in his office relating to such corporations. (Sec. 1, pp. 21, 22, 23, Acts 29th Leg. 1905.) And by an amendment thereto, p. 100, sec. 1, Acts of 29th Leg., it was further provided that it should be a misdemeanor on the part of the officers of said corporations subject to the payment of such franchise tax, to fail to give under oath accurate information as to the amount of its capital stock, when demanded by said Secretary of State. There was a somewhat similar provision in the revised statutes in force in 1901, relative to the right of granting permits to foreign corporations to do business within this State, but the amount of such tax was increased by the acts of the 29th Legislature.

We do not think that because a permit was granted to appellant under a former law that the State would be thereby precluded from passing any further franchise tax upon the same subject, even though it changed the conditions and imposed a greater tax than the former law. At the time said permit was first granted our statute (Art. 650) expressly provided that "all charters or amendments to charters under the provisions of this chapter shall be subject to the power of the Legislature to alter, reform or amend the same." And while this act might be regarded as applicable alone to domestic corporations, there seems to be no good reason why this should not be held to be the law in the absence of such a statute, because it has been held that unless the grant of a franchise to a foreign corporation expressly exempted it from license taxation, the imposition of such tax

24 is not invalid and does not impair the obligation of any contract, and that no corporation could claim an immunity from taxation or from license because it paid a consideration for its charter or franchise, in the absence of a stipulation on the part of the State or other taxing power that the bonus was received in lieu of any further or future taxation. Even a provision in a charter fixing a specified sum to be paid as taxes, but not providing that such sum shall be in lieu of other taxes, is not a contract that no greater tax shall be laid. (*New Orleans City R. R. Co. vs. New Orleans*, 149 U. S., 192; *Delaware R. R. Tax vs. P. W. & B. R. R. Co.*, 18 Wall., 206; *Ry. Co. vs. Philadelphia*, 101 U. S., 528; *Citizens Savings Bank vs. Owensborough*, 173 U. S., 636; *Covington vs. Kentucky*, 173 U. S., 231; *Louisville Water Co. vs. Clark*, 143 U. S., 1; *Wyandotte vs. Corrigan*, 35 Kan. 21; *Gray on Limitation of Taxing Power*, pars. 1001-5-8; *Murphree on Foreign Corporations*, pars. 34-36). Besides this, our State Constitution provides "that the power to tax corporations and corporate property shall not be surrendered or suspended by act of the Legislature by any contract or grant to which the State shall be a party." (Art. 8, sec. 4.) which was in force when appellant secured its permit.

We therefore hold that, notwithstanding a former permit had been granted, the inherent power remained in the State to change or amend the law at any time thereafter even to the extent of levying

an additional burden for the permission granted to foreign corporations to do business within the State; and that such change of the law would not be in violation of the Constitution prohibiting the passage of any act impairing the obligation of contracts.

By its 11th proposition under this assignment appellant urges that the tax in question was a property tax; and by its 12th, that fees paid to the Secretary of State for obtaining a permit for incorporation are not taxes; and by its 13th that graduated taxes are  
25 illegal, and therefore, that the acts of the Legislature under consideration are in violation of the Constitution of the State. Appellee, on the other hand, insists that the tax in question is not a property tax, but is a privilege or license tax, and is, therefore, in no respect invalid or illegal.

It is well settled that a state has the absolute right to exclude or permit foreign corporations from doing business within its boundaries, and that it is an act of comity or grace on its part to permit their coming in at all, and it has the right to impose such conditions as it may see proper in granting said permission. In *Beale on Foreign Corporations*, sec. 508, it is said: "The granting of such right of privilege rests entirely within the discretion of the State, and, of course, when granted may be accompanied with such conditions as its Legislature may judge most befitting to its interest and policy. It may require as a condition of the granting of the privilege and also of its continued exercise, that the corporation pay a specified sum to the State each year or month, or a specified portion of its gross receipts or of the profits of its business, or a sum to be ascertained in any convenient mode which it may prescribe. The validity of the tax can in no way be dependent upon the mode which the State may deem fit to adopt in fixing the amount for any year, which it will exact for the franchise. No constitutional objection lies in the way of a legislative body prescribing any mode of measurement to determine the amount it will charge for the privilege it bestows."

It is further said in the same section: "This tax is not a property tax, even when it is measured by the amount of property of a corporation. Therefore, to levy such a tax in addition to a property tax is not double taxation, and the tax is not subject to a constitutional requirement that taxes shall be uniform."

26 The same author, section 509, continuing, says: "A state may, as has been seen, tax any privilege it grants. Such a tax, or rather license fee, is the payment exacted of a foreign corporation for the privilege of doing business within the state. Since a foreign corporation may be allowed to do business in a state upon conditions, the payment of a sum of money may be made a condition; and this may in form be the payment of a tax greater than or different from that paid by a domestic corporation. Such a tax is valid. It is not properly an exercise of the power to tax property, but is a license fee paid for the privilege of entering the state, and its validity is a necessary deduction from the right absolutely to exclude the foreign corporation." See also *Gray on Limitations of Taxing Powers*, pars. 54 to 57; *Home Ins. Co. vs. New York*, 134 U. S., 594.

Taxes imposed on a foreign corporation as a condition of doing

business generally in the State, not connected with the grant of any special privilege, is a license or privilege tax, and not a property tax, although the amount of it may be determined by the capital stock of the corporation. A foreign corporation can only come into the State and do business there by the consent of the State, and the charge imposed by the State as the condition of that consent is not a tax on property. (*Horn Silver Mining Co. vs. New York*, 143 U. S., 305; *Murphree on Foreign Corporations*, par. 143.)

We think the quotations from the foregoing authorities amply establish the principle that the State has the authority to impose a franchise tax, and that the same is constitutional. We therefore overrule this assignment.

But it is insisted by appellant under another assignment that since it appears from the allegations of its petition that it was doing an interstate business, therefore, it was not subject to the franchise tax demanded of it, and hence the tax, having been paid by it under protest, that it should be held to have the right to recover the

27 same. In reply to this it might be said that the permit granted to it was for the purpose of allowing it to do business within the State, and that it was no fault on the part of the State that it failed to conduct a business therein in accordance with its permit. And the fact that it paid a franchise tax for this purpose could not affect the question if said franchise tax was legal, which we hold to be the case. The ground of the protest in this instance was not that the tax was illegal because of the fact that appellant was doing an interstate business, but for the reason alone, as stated in its protest, that the law itself imposing this franchise tax was unconstitutional and void. It therefore follows that if the law imposing the franchise tax is legal, that appellant is in no position to complain on this score; but it is insisted by appellee that the taxes sought to be collected were voluntarily paid, and therefore cannot be recovered, even though illegally exacted. The rule on this subject seems to be clearly stated in *Dillon on Municipal Corporations*, vol. 2, p. 947, as follows: "Where a party pays an illegal demand with the full knowledge of all the facts which renders such demand illegal, without an immediate and urgent necessity therefor, or unless to release his person or property from detention, or to prevent an immediate seizure of his person or property, such payment must be deemed to be voluntary, and cannot be recovered back; and the fact that the party at the time of making the payment files a written protest does not make the payment involuntary." So that in the present case it cannot be urged that the demand on the part of the officer that appellant should pay the tax for doing business within the State was an unlawful demand, because he clearly had the right to make such demand. The demand was not made for the payment of a tax for doing an interstate business, but for doing business within the State. This objection, that it was not in fact doing business within the State, was not then urged, and seems not to have been within the contemplation either of the Secretary of State or of appellant at the time of the demand for and the payment of the money. If appellant was doing an interstate

business, as pleaded and contended for by it, then a forfeiture of its permit could in no wise affect it, because its right to do an interstate business without first obtaining a permit is unquestioned (*Allen vs. Tyson-Jones Buggy Co.*, 91 Tex., 22; *Miller vs. Goodman*, 91 Tex., 41; *Lassiter vs. Mill & Elevator Co.*, 54 S. W., 425; *Ry. Co. vs. Davis*, 55 S. W., 562). So that the payment of the franchise tax in response to the demand by the Secretary of State was, in our judgment, a voluntary payment on the part of appellant with a full knowledge of the facts. It was not made under compulsion or duress, so that even if it were held to have been unlawfully imposed and exacted, which in our judgment was not the case, it is not recoverable (*Houston vs. Feeser*, 76 Tex., 365, *Galveston City Co. vs. Galveston*, 56 Tex., 494; *Galveston Co. vs. Gorman*, 49 Tex., 310; *Lamborn vs. County Commissioners*, 97 U. S., 181; *Railroad Co. vs. Commissioners*, 98 U. S., 542; *Little vs. Bowers*, 134 U. S., 554; *San Francisco N. B. Co. vs. Dinwiddie*, 13 Fed. 789; *Wessel vs. Johnson Land & Mortgage Company*, 44 Am. St. Rep., 529; *First Natl. Bank vs. Mayor*, 45 Am. Rep. 476; *Peebles vs. City of Pittsburg*, 47 Am. Rep., 714; *McMillan vs. Richards*, 9 Cal., 417; *Phelps vs. New York*, 2 L. R. A. 626; *Phillips vs. Jefferson County*, 5 Kan., 412; *Abaunsee County vs. Walker*, 8 Kan., 431; *Robbins vs. Latham*, 36 S. W., 33; *Sheldon vs. School District*, 24 Conn., 88; *Cooley on Taxation*, vol. 2, p. 1500; *Dillon on Municipal Corporations*, vol. 2, p. 947.)

Again, it is urged that the tax imposed discriminated in favor of domestic corporations as against foreign. It will be observed that the tax is imposed alike upon all foreign corporations. (Acts 29th Leg. Chaps. 19 and 72) In *Murphree on Foreign Corporations*, par., 162, where other authorities on the same subject are collated, it is said: "A tax imposed upon foreign companies, but which does not apply to domestic corporations, is not for that reason obnoxious to the provisions of most of the State constitutions requiring taxes to be equal and uniform. Since the effect of such legislation is simply to classify corporations and to impose certain taxes upon the class of foreign companies; and the classification being based upon legitimate distinctions, and the burden being equal within the class, there can be no question as to the validity of the tax. Nor could the provision as to equality and uniformity be applied to license taxes, for they are in their very nature, the subject of governmental discretion." The tax so imposed, being equal and alike upon all foreign corporations within the same class, we therefore think cannot be assailed merely upon the ground that a less tax is imposed upon domestic corporations; the effect of the act being simply to classify corporations and impose a like tax upon all within the same class, which, under the law, it seems the State has the clear right to do. We therefore overrule this contention.

It will be noticed that the petition in this case fails to allege that appellee had the money so collected from appellant in his possession at the time the suit was instituted. This being true, it is the opinion of the writer, however not concurred in by the majority of the Court, that the petition was insufficient on this ground, and that the demurrer was for this reason also properly sustained; but the de-

cision, of course, is not predicated upon this conclusion. In the case of Hardesty vs. Fleming, 57 Tex., 399, it was held that a suit might be brought against a tax collector to recover taxes illegally collected, if paid under protest, provided suit was brought before the money was paid over by the collecting officer; but in the case of Continental Land & Cattle Co. vs. Board, it is said: "A better rule is that the collecting officer is exempt from liability to the tax payer, who should seek relief from the state, county or municipality on whose account the tax was collected." See also on the same subject Texas Land & Cattle Co. vs. Hemphill, 61 S. W., 333, where the same rule is announced.

30 The remaining assignments of error, in our judgment, are not well taken, and, without discussing them in detail, the same are overruled.

Believing that no error has been shown, the judgment of the trial court is affirmed.

B. H. RICE,  
*Associate Justice.*

Filed December 16, 1908.

(Endorsed:) No. 4174. Gaar, Scott & Company, Appellants, vs. O. K. Shannon, Appellee. Appeal from Travis County. Opinion. Affirmed. Filed in Court of Civil Appeals, 3rd Supreme Judicial District, Austin, Texas, Dec. 16, 1908. R. H. Connerly, Clerk.

*Motion for Rehearing.*

No. 4174.

In the Court of Civil Appeals, Third Supreme Judicial District of Texas, at Austin.

GAAR, SCOTT AND COMPANY, Appellants,  
vs.

O. K. SHANNON, Appellee.

*Application for Rehearing.*

Now comes the appellant, the Gaar, Scott & Company, in the above styled and numbered cause and moves this Honorable Court to set aside the judgment rendered in this cause on December 16, 1908, affirming the judgment of the court below and to grant appellant a rehearing, and reverse the judgment of the court below for the following reasons:

31 First. Because this Honorable Court erred in refusing to sustain appellant's first assignment of error that the court below "erred in sustaining defendant's general demurrer to the petition of plaintiff, because it appears from the face of plaintiff's said petition and the facts therein alleged that a cause of action is stated therein against the defendant," and holding with the trial court that said petition was subject to general demurrer.

Second. Because this Honorable Court erred in refusing to sustain appellant's third proposition under its first assignment of error, said proposition being that "a taxing officer can be sued, and that he cannot justify upon the ground that the suit is against the State."

Third. Because this Honorable Court erred in refusing to sustain appellant's fourth proposition under its first assignment of error, said proposition being that the taxes sought to be recovered by appellant from the appellee in this case were not voluntarily paid by appellant, and in holding that the money sought to be recovered by appellant from the appellee was voluntarily paid by appellant to the appellee.

Fourth. Because this Honorable Court erred in refusing to sustain appellant's second assignment of error that "the court below erred in sustaining the defendant's general demurrer to the petition of plaintiff, because it appears from the facts alleged in plaintiff's said petition that the suit was brought by plaintiff to recover moneys which it had paid to the defendant under protest and duress and to prevent him from declaring its permit to do business in the State of Texas forfeited," and because this Honorable Court erred in holding that the money sought to be recovered in this cause by it from the appellee was not paid under protest and duress.

Fifth. Because this Honorable Court erred in refusing to sustain appellant's first proposition under its second assignment of error, said proposition being that "taxes paid under protest, duress or compulsion may be recovered back in an action at law if illegal," and because this Honorable Court erred in holding that the taxes that appellant paid the money for to appellee were not illegal and void, and that the same were not paid under protest and duress.

Sixth. Because this Honorable Court erred in refusing to sustain appellant's third assignment of error that the court below "erred in sustaining the defendant's general demurrer to the petition of plaintiff, because it appears from the face of plaintiff's petition and the facts stated therein that the franchise laws of the State of Texas, same being chapters 19 and 72 of the General Laws of the 29th Legislature of the State of Texas, are unconstitutional and void, being in contravention of the Constitution of the United States and also of the Constitution of the State of Texas."

Seventh. Because this Honorable Court erred in refusing to sustain appellant's first proposition under its third assignment of error, said proposition being that "chapters 19 and 72 of the laws of the 29th Legislature of the State of Texas impair the obligation of the contract entered into between the State of Texas and plaintiff on the 23rd day of May, 1901," and because this Honorable Court erred in holding that the granting of a permit by the State of Texas to appellant on May 23rd, 1901, for a period of ten years, and its payment for the same, did not constitute a contract between appellant and the State of Texas.

Eighth. Because this Honorable Court erred in refusing to sustain appellant's second proposition under its third assignment of error, said proposition being that "interstate commerce cannot be taxed or discriminated against in any way," and that "a tax upon a

foreign corporation doing purely an interstate commerce like the tax in question is in violation of paragraph 3, section 8, article 1 of the Constitution of the United States," and because this  
 33 Honorable Court erred in holding that the tax imposed by chapters 19 and 72 of the General Laws of the 29th Legislature of the State of Texas was not a tax upon interstate commerce.

Ninth. Because this Honorable Court erred in refusing to sustain appellant's seventh proposition under its third assignment of error, said proposition being that "corporations are persons and are protected by the Fourteenth Amendment to the Constitution of the United States, which provides that no State shall make or enforce any law which shall abridge the privileges or immunities of the citizens of the United States, nor shall any State deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the law."

Tenth. Because this Honorable Court erred in refusing to sustain appellant's eighth proposition under its third assignment of error, said proposition being that "the laws of the 29th Legislature, chapters 19 and 72, of the State of Texas, are in violation of the 14th Amendment of the Constitution of the United States."

Eleventh. Because this Honorable Court erred in refusing to sustain appellant's ninth proposition under its third assignment of error, said proposition being that "a state law which attempts to tax that which is beyond its jurisdiction is void and violates provisions of the 14th amendment of the Constitution of the United States."

Twelfth. Because this Honorable Court erred in refusing to sustain appellant's tenth proposition under its third assignment of error, said proposition being that "discriminating taxes are illegal and in violation of the Constitution of the United States."

*Twelfth.* Because this Honorable Court erred in refusing to sustain appellant's eleventh proposition under its third assignment  
 34 of error, said proposition being that "the tax in question is a property tax."

Thirteenth. Because this Honorable Court erred in refusing to sustain appellant's thirteenth proposition under its third assignment of error, said proposition being that "graduated taxes are illegal, and that chapter 19 of the General Laws of the 29th Legislature of the State of Texas is in violation of the Constitution of the State of Texas, and special provision of section 48, article 3; and sections 1, 2 and 3, article 8."

Fourteenth. Because this Honorable Court erred in refusing to sustain appellant's fourteenth proposition under its third assignment of error, said proposition being that "the law can not, after having granted a permit to a foreign corporation, tax them greater than domestic corporations."

Fifteenth. Because this Honorable Court erred in refusing to sustain appellant's fifteenth proposition under its third assignment of error, said proposition being that "if the tax imposed by chapters 19 and 72, General Laws of 1905 of the State of Texas, is not a property tax, it is an occupation tax and invalid because not equal and uniform upon the same class of subjects."

Sixteenth. Because this Honorable Court erred in refusing to sustain appellant's sixteenth proposition under its third assignment of error, said proposition being that "chapter 19 of the General Laws of the 29th Legislature of the State of Texas is unconstitutional and void, because it was not read on three several days in each House of the Legislature, as required by section 32, article 3 of the Constitution of Texas." the petition of appellant alleging that the Constitution was not complied with and demurrer admitting the allegation to be true.

35      Seventeenth. Because this Honorable Court erred in refusing to sustain appellant's seventeenth proposition under its third assignment of error, said proposition being that "chapter 72 of the laws of 1905 was not adopted according to the Constitution" of the State of Texas.

Eighteenth. Because this Honorable Court erred in refusing to sustain appellant's eighteenth proposition under its third assignment of error, said proposition being that "chapter 19 is unconstitutional and void because it attempts to delegate judicial authority to the Secretary of State to fix penalties and declare forfeitures."

Nineteenth. Because this Honorable Court erred in refusing to sustain appellant's nineteenth proposition under its third assignment of error, said proposition being that chapter 19th of the 29th Legislature of the State of Texas is in violation of the Constitution of the State of Texas in that its title embraces more than one subject.

Twentieth. Because this Honorable Court erred in holding that chapters 19 and 72 of the General Laws of the 29th Legislature of the State of Texas do not impose a tax upon interstate commerce as to foreign corporations.

Twenty-first. Because this Honorable Court erred in holding that chapters 19 and 72 of the laws of the 29th Legislature of the State of Texas neither imposed a property tax nor an occupation tax on foreign corporation-, and that the same were not in violation of the Constitution of the State of Texas.

Twenty-second. Because this Honorable Court erred in holding that the money sought to be recovered from the appellee by appellant was not paid by appellant to appellee under duress, and because this Honorable Court erred in holding that said money was paid to appellee voluntarily by appellant.

36      Appellant represents that Hon. R. V. Davidson, Attorney General of the State of Texas, is attorney of record for the appellee.

Wherefore, premises considered, appellant prays that notice according to law be given of this application, and that on hearing thereof, the judgment affirming the cause heretofore rendered herein be set aside and a rehearing granted, and that further proceedings be had herein as prayed for in appellant's original brief.

Respectfully submitted,

BULKLEY, GRAY & MOORE AND  
J. M. PATTERSON,

*Attorneys for Appellant.*

(Endorsed:) With App. No. 6204. Mo. 3104. No. 4174. In the Court of Civil Appeals, Third Supreme Judicial District, at Austin. Gaar, Scott & Company, Appellants, vs. O. K. Shannon, Appellee. Appellants' Application for Rehearing. Filed in Court of Civil Appeals, 3rd Supreme Judicial District, Austin, Texas, Dec. 31, 1908. R. H. Connerly, Clerk. Overruled. Filed in Supreme Court Feb. 18, 1909. F. T. Connerly, Clerk.

*Order Overruling Motion for Rehearing.*

Made January 20th, 1909.

Motion 3104. No. 4174. Gaar, Scott & Company vs. O. K. Shannon; Appeal from Travis County. Motion for a Rehearing: The motion is overruled.

37 *Application for Writ of Error to Supreme Court of Texas.*

In the Supreme Court of the State of Texas.

No. —.

GARR, SCOTT AND COMPANY, Plaintiffs in Error,

vs.

O. K. SHANNON, Defendant in Error.

Appealed from the District Court of Travis County, Texas, 26th Judicial District. Judgment affirmed by the Court of Civil Appeals for the Third Supreme Judicial District, at Austin, and appellant's motion for rehearing overruled.

*Application for Writ of Error.*

To The Honorable Supreme Court of the State of Texas:

Your petitioner, Garr, Scott and Company, respectfully represents that, in the above styled and numbered cause, on the 16th day of December, A. D. 1908, the Court of Civil Appeals at Austin, affirmed said cause and thereafter, in due time, your petitioner filed its application for a rehearing in said Court of Civil Appeals, which application was thereafter, to-wit: on the 20th day of January, A. D. 1909, overruled and denied in all things by said Court of Civil Appeals.

Your petitioner further represents that this suit was brought by it against the defendant in error to recover from him the sum of \$287.00 paid to him as Secretary of the State of Texas, on or about April 24, 1905, and the sum of \$288.00 paid to him as Secretary of the State of Texas on or about April 30, 1906, both of said payments being made to defendant in error under protest, for a purported franchise tax claimed by the defendant in error of your petitioner under certain purported acts of the Twenty-ninth Legislature

of the State of Texas, and known as Chapters 19 and 72 of the General Laws of 1905, on the ground that said acts are unconstitutional and void, because in violation of the Constitution of the United States, and also in violation of the Constitution of the State of Texas.

Said suit was instituted in the District Court of Travis County, Texas. A general demurrer was filed by defendant in error to your petitioner's petition in the trial court, and sustained by said trial court, said petition setting forth the facts on which it is claimed that the tax is void, the laws on which it is based unconstitutional, and the allegations therein being as follows:

"Your petitioner, the Garr, Scott & Company, complaining of O. K. Shannon, hereinafter styled defendant, respectively alleges and shows that your petitioner is a private corporation, duly incorporated under and by virtue of the laws of the State of Indiana, that your petitioner has its domicile and principal place of business in the City of Richmond, in the County of Wayne, State of Indiana, and that your petitioner has now and has continuously for a long time prior hereto, to-wit: since on or about May 23, 1901, had a permit to do business in the State of Texas; and that the defendant resides in Travis County, Texas, and for cause of action your petitioner alleges and shows the following:

"1. That heretofore, to-wit: on or about the 23rd day of May, A. D. 1901, a permit was granted your petitioner, under the General Laws of Texas, to do business in the State of Texas, as a private foreign corporation for pecuniary gain and profit, for a period of ten years, by the Secretary of State of the State of Texas, and that your petitioner on said date last mentioned paid to the said Secretary of State of the State of Texas, all fees required of it for its said permit to do business in the State of Texas by the General Laws of said State of Texas then in force.

"2. That after said permit had been granted to your petitioner and paid for, as aforesaid, your petitioner received a notice from the Secretary of the State of Texas, on or about March 3, A. D. 1905, notifying your petitioner by a printed notice or circular issued out of the office of the said Secretary of State, to the effect that the Legislature of the State of Texas had passed and put into force a purported Act known as Chapter 19 of the General Laws of the State of Texas passed by the 29th Legislature of the State of Texas at its regular session, A. D. 1905, and that your petitioner would be required to pay as a private foreign corporation the tax imposed by said purported Act of the Legislature of the State of Texas to the Secretary of State of the State of Texas by the 1st day of May, A. D. 1905, and that on failure of your petitioner to pay to said Secretary of State said tax by the 1st day of May A. D. 1905, it would be and become liable to pay a penalty of twenty-five per cent of the amount of the tax sought to be imposed upon it by said purported Act of the 29th Legislature of the State of Texas, for the year beginning May 1, 1905, and ending May 1, 1906 and that if the amount of said tax and penalty was not paid by your petitioner by the 1st day of July thereafter, its said permit to do business in

the State of Texas would be forfeited and cancelled by the said Secretary of State without judicial ascertainment, and that after such forfeiture your petitioner would be deemed an outlaw and denied not only the right to do business in the State of Texas, but also the right to either sue or defend in any of the courts of the State of Texas, and also the right to set up and ask any affirmative relief on all causes of action accruing to it prior to such forfeiture. That at the time of the passage of the purported Act of the 29th Legislature of the State of Texas, said purported Act being Chapter 19 of the General Laws of the State of Texas passed by said 29th Legislature at its regular session, A. D. 1905, your petitioner had large

40 amount of debts owing to it by residents and citizens of the State of Texas, a large proportion of said debts were not due and payable until long after May 1, 1905, and July 1, 1905. And your petitioner further alleges that the said 29th Legislature of the State of Texas passed at its regular session, A. D. 1905, another purported Act, known as Chapter 72 of the 29th Legislature of the State of Texas, A. D. 1905, and that said purported law attempted to provide and prescribe how the tax sought to be imposed by the purported Act known as Chapter 19 of the 29th Legislature should be computed, and to declare certain acts of corporate officers to be a misdemeanor. That in order to prevent the Secretary of State of Texas from attempting to impose and exact said penalty of twenty-five per cent of the amount of said tax sought to be imposed by said purported Acts of the 29th Legislature of the State of Texas on your petitioner and to prevent the said Secretary of State from declaring your petitioner's permit to do business in the State of Texas forfeited and thereby deprive it not only of the right thereafter to do business the the State of Texas, but also of the right to sue or defend in any of the courts of the State of Texas and of being allowed any affirmative relief on any cause of action accruing to it prior to such forfeiture prescribed and provided in said purported Acts of the 29th Legislature of the State of Texas, your petitioner paid to O. K. Shannon, on or about April 28, 1905, the sum of \$287.00, as the tax imposed by said purported Acts of the 29th Legislature of the State of Texas upon your petitioner for the year beginning May 1, 1905, and ending May 1, 1906; that the said O. K. Shannon at the time the payment of said sum of \$287.00 was made by your petitioner to him, as aforesaid, claimed to have the right and authority as Secretary of the State of Texas, to exact the payment of said sum of money and to receive the same from your petitioner, and to impose and enforce the penalties prescribed and provided by said purported Acts of the 29th

41 Legislature of the State of Texas, and that in order to prevent the said O. K. Shannon from adjudging and declaring without judicial ascertainment or intervention that your petitioner was liable for the said twenty-five per cent penalty prescribed by said purported Acts of the 29th Legislature, as aforesaid, and also to prevent him from declaring and adjudging, without judicial ascertainment or intervention, that your petitioner's permit to do business in the State of Texas was forfeited and cancelled, and that it was

no longer entitled to sue or defend in any of the courts of the State of Texas or to ask affirmative relief on any cause of action accruing to it prior to said forfeiture and cancellation of its permit to do business in the State of Texas by the said O. K. Shannon, as aforesaid, your petitioner did pay to the said O. K. Shannon the sum of \$287.00, on or about April 28, 1905, under duress and under protest; that your petitioner protested against the payment by it of said sum of \$287.00 to the said O. K. Shannon at the time it paid the same to him upon the ground that the said purported Acts of the 29th Legislature of the State of Texas under which the said O. K. Shannon held that your petitioner was liable to pay the same, as a tax, were illegal and void as in contravention of the Constitution of the State of Texas, and of the Constitution of the United States. And your petitioner further alleges that at the time it paid the said O. K. Shannon the sum of \$287.00, as aforesaid, that it not only paid same under protest as aforesaid, but that it also then and there notified him in writing that it reserved the right to and would institute suit to recover said sum of \$287.00 from him, and that its said protest and notice were in writing and substantially as follows:

42 "We beg to advise you that we pay this tax under protest, on the ground that the franchise tax law of your State is in violation of the Constitution of the State of Texas, also in violation of the Constitution of the United States, and it is, therefore, void. We consider that this franchise tax is illegal, and we reserve the right to recover back the amount we have paid in the event that it shall be decided that the law is unconstitutional, and that the tax was illegally imposed."

"And your petitioner further alleges that its capital stock on May 1, 1905, was the sum of \$400,000.00, and that it had then on hand a surplus of property \$737,211.20, and that said sum of \$287.00 paid by it to O. K. Shannon, as aforesaid, was exacted by him from your petitioner as a tax due from your petitioner on said capital stock and surplus under said purported Acts of the 29th Legislature of the State of Texas.

"3. And your petitioner further alleges that heretofore, to-wit: on or about April 30, 1906, it paid to the said O. K. Shannon the further sum of \$288.00, as a tax under said purported Acts of the 29th Legislature of the State of Texas, for the year beginning May 1, 1906, and ending May 1, 1907 in order to prevent the said O. K. Shannon from adjudging and declaring without judicial ascertainment or intervention, your petitioner liable for the said twenty-five per cent penalty on the amount of tax claimed by him to be due by your petitioner under said purported Acts of the 29th Legislature of the State of Texas, for the year beginning May 1, 1906, and ending May 1, 1907, and also to prevent him from adjudging and declaring without judicial ascertainment or intervention, your petitioner's permit to do business in the State of Texas, forfeited and cancelled, and thereby attempting to deprive it not only of the right to do business in the State of Texas, without judicial ascertainment or intervention, but also of the right to sue or defend in any of the

43 courts of the State of Texas, and from asking or seeking affirmative relief on any cause of action in the courts of Texas accruing to it prior to said forfeiture. That your petitioner also paid said sum of \$288.00, under protest in writing against the payment of the same to him at the time said payment was made, and that at the time of payment the said sum of \$288.00 to him, it protested paying the same to him upon the ground that said purported Acts of the 29th Legislature of the State of Texas, were illegal and void as in contravention of the Constitution of the State of Texas, and of the Constitution of the United States; and plaintiff further alleges that it notified the said O. K. Shannon at the time it paid said sum of \$288.00 to him, as aforesaid, that it reserved the right to and would institute suit against him to recover from him the said sum of \$288.00, and that its said protest and notice were in writing and substantially as follows: 'We beg to advise you that we pay this tax under protest, on the ground that the franchise tax law of your state is in violation of the Constitution of the State of Texas, and also the constitution of the United States, and it is therefore void. We reserve the right to recover back the amount of taxes we have paid in the event that it shall be decided that the law is unconstitutional.'

"And your petitioner further alleges that its capital stock on May 1, 1906, was the sum of \$400,000.00 and that the surplus of the property than on hand was the sum of \$753,188.00, and that said sum of \$288.00, paid by it to the said O. K. Shannon, as aforesaid, was exacted by him from your petitioner as the tax due from your petitioner on its said capital stock and surplus under said purported Acts of the 29th Legislature of the State of Texas.

44 "4. Your petitioner alleges that it is a corporation engaged in business at Richmond, Indiana, in the manufacture and sale of *threas-*ing machinery, portable traction engines, saw mills and clover hullers, and that its office and principal place of business is located in Richmond, in the County of Wayne, in the State of Indiana, and that it only transacts an interstate business in the State of Texas in the sale of its manufactured products. That it employs at Dallas and Houston, Texas, agents who solicit and superintend the soliciting of orders for the goods manufactured by it at Richmond, Indiana, which orders are taken by such agents or persons, subject to the approval of your petitioner's officers at Richmond, Indiana, and that this applies to all goods sold by your petitioner in the State of Texas; and your petitioner further alleges that it was at the time its permit was granted to it to do business in the State of Texas, as aforesaid, and that it is now and has been ever since said permit was granted to it engaged in an interstate commerce business protected by paragraph three, section eight of Article one of the Constitution of the United States.

"5. Your petitioner further alleges that the Acts of March 1, 1905, and of April 11, 1905, of the 29th Legislature of the State of Texas, said Acts being Chapters 19 and 72 of the General Laws of the State of Texas of 1905, are and each of them is unconstitutional and void, because said purported Acts attempt to impose unjust and illegal bur-

dens and taxes upon foreign corporations, which have obtained a permit to do business in the State of Texas, and because said purported Acts make an unjust and unreasonable discrimination between domestic and foreign corporations in the amount of taxes levied and assessed against said respective kinds of corporations. That said Acts and each of them are illegal and void in that they attempt to impose a tax on property not within the state and on property over which the State has no control, and penalties upon officers of corporations not within the State. That said Acts are and each of them is in contravention of Article 8, Section 1, of the Constitution of the

45 State of Texas, which provides, among other things, that all taxes shall be equal and uniform. That said Acts and each of them is in violation of Article 8, Section 2 of the Constitution of the State of Texas, which provides, among other things, that all occupation taxes shall be equal and uniform on the same class of subjects; that said Acts make and unjust and unreasonable discrimination between domestic and foreign corporations and place a heavier burden upon foreign corporations organized for the some kind of business as domestic corporations notwithstanding such foreign corporation is not engaged in business within the State of Texas; that said Acts of March 1, 1905, of the 29th Legislature of the State of Texas, said Act being Chapter 19 of the General Laws of the State of Texas of 1905, is in violation of Section 35, Article 3, of the Constitution of the State of Texas, providing that no bill except the appropriation bills shall embrace more than one subject and which shall be expressly stated in its title, and that said Act of April 11, 1905, of the 29th Legislature of the State of Texas, being Chapter 72 of the General Laws of the State of Texas of 1905, is in violation of Section 35, Article 3, of the Constitution of the State of Texas; that said Acts of the 29th Legislature known as chapters 19 and 72 are and each of them is in violation of Section 16, Article 1, of the Constitution of the State of Texas, providing that the Legislature of the State of Texas shall not pass any law impairing the obligation of contracts. That said Act of March 1, 1905, and known as Chapter 19 of the General Laws of 1905, is void and unconstitutional because it attempts to delegate judicial authority to the Secretary of State to adjudge and declare forfeiture and fix penalties for failure to comply with said Act. That said Acts of the 29th Legislature of the State of Texas of March 1, 1905, and April 11, 1905, known as Chapters 19 and 72 are and each of them is in violation of paragraph

46 3, Section 8, of the Constitution of the United States, which provides that Congress shall have power to regulate commerce with foreign nations, among the several states and with the Indian tribes in that it attempts to impose a tax upon and discriminates against goods manufactured in a foreign state, which goods are subject to the protection of said paragraph 3, section 8, of the Constitution of the United States; that said Acts are and each of them — in violation of paragraph one, section 10 of the Constitution of the United States which provides, among other things, as follows: that no State shall pass any bill of attainder, ex post facto law, or law impairing the obligation of contracts; and that such acts are and

each of them is in violation of Section 1, of the 14 amendment of the Constitution of the United States, which provides, among other things, that no state shall make or enforce any law which abridges the privileges or immunities of the citizens of the United States. Nor shall any state deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction equal protection of the law. Wherefore, your petitioner says that both and each of said acts of the 29th Legislature of the State of Texas, is unconstitutional and void, and conferred upon the defendant no right, power or authority to demand and receive from plaintiff said sums of money as tax or otherwise. And your petitioner further alleges that defendant wrongfully and illegally demanded and received said sums of money from your petitioner to its damage in the sum of \$575.00 with legal interest thereon from the respective dates that he demanded and received said sums of money, as aforesaid. And your petitioner further says that chapter 19 of the General Laws of the 29th Legislature of the State of Texas is unconstitutional and void, because it was not read on three several days in each house of said Legislature nor passed by a 4/5th-vote in each house of said Legislature as required by Section 32, Article 3 of the Constitution of the State of Texas.

47 "6. Your petitioner further alleges that it not only paid said sums of money to the said O. K. Shannon under protest, as heretofore alleged, but that it paid the same to him under duress and for the purpose of preventing him from declaring its permit forfeited, imposing the penalties provided in said Acts of the 29th Legislature of the State of Texas and jeopardizing its right to sue and defend in the courts of Texas; and plaintiff further alleges that said sums of money were illegally and wrongfully demanded by the said O. K. Shannon from it, that he was without right, power or authority to demand and receive said sums of money from your petitioner, and that the same were by him illegally and wrongfully taken from your petitioner, and that the same were received by him for an illegal and wrongful purpose, and your petitioner further alleges that by reason of the illegal and wrongful acts of the said O. K. Shannon, as aforesaid, he has become and is liable to your petitioner for each of said sums of money paid to him by it, together with legal interest thereon from the respective dates of each of said payments, and that your petitioner has been damaged in the sum of \$575.00, with legal interest thereon as aforesaid, by reason of said wrongful and illegal acts of the defendant, and though plaintiff has demanded the return of each of said sums of money to it, by the said O. K. Shannon, he has refused and failed to return the same or any part thereof and still fails and refuses to *refuses to* return the same or any part thereof to plaintiff's damage in the sum of \$575.00, with legal interest thereon.

"Wherefore, premises considered, plaintiff prays that the said O. K. Shannon, be cited to answer this petition, and that upon final hearing it have judgment against him for the sum of \$575.00, together with legal interest thereon; said interest to be computed on

48       \$287.00 of said sum of \$575.00 from the 28th day of April, 1905, and on \$28.00 of said sum from the 30th day of April, 1906, together with all costs of court in this behalf incurred; and for such other general and equitable relief as it may be found entitled to either in law or equity."

Your petitioner perfected its appeal in due time from the judgment of the trial court sustaining defendant's general demurrer to plaintiff's petition and the judgment of the trial court in favor of the defendant to the Court of Civil Appeals for the Third Supreme Judicial District, at Austin, and the Honorable Court of Civil Appeals affirmed the judgment of the trial court, and refused your petitioner's motion for a rehearing.

Your petitioner now applies to the Supreme Court for a writ of error to the end that said court may review the said cause and the action of the Court of Civil Appeals therein, and correct such action, and as reasons and grounds for the granting of such writ of error, your petitioner assigns the following errors committed by the Court of Civil Appeals in affirming the judgment of the trial court, and in refusing your petitioner a rehearing to-wit:

First. The Court of Civil Appeals erred in refusing to sustain appellant's first assignment of error that the trial court "erred in sustaining defendant's general demurrer to plaintiff's petition, because it appears from the face of plaintiff's petition and the facts therein alleged that a cause of action is stated therein against the defendant, and holding with the trial court that said petition was subject to general demurrer.

#### *Statement.*

For statement of facts, we respectfully refer the court to pages 2 to 10 of appellant's brief.

49       Second. The Court of Civil Appeals erred in refusing to sustain appellant's third proposition under its first assignment of error, said proposition being that "a taxing officer can be sued, and that he cannot justify upon the ground that the suit is against the State."

#### *Authorities.*

For authorities on this proposition, we respectfully refer the court to the authorities cited on page 13 of appellant's brief.

Third. The Court of Civil Appeals erred in refusing to sustain appellant's fourth proposition under its first assignment of error, said proposition being the taxes sought to be recovered by appellant from the appellee in this case were not voluntarily paid by appellant, and in holding that the money sought to be recovered by appellant from appellee was voluntarily paid by it to appellee.

*Authorities.*

For authorities on this proposition, we respectfully refer the court to the authorities cited on page 16 of appellant's brief.

Fourth. The Court of Civil Appeals erred in refusing to sustain appellant's second assignment of error that "the court below erred in sustaining the defendant's general demurrer to the petition of plaintiff, because it appears from the facts alleged in plaintiff's said petition that the suit was brought by plaintiff to recover moneys which it had paid to the defendant under protest and duress and to prevent him from declaring its permit to do business in the State of Texas forfeited," and because the Court of Civil Appeals erred in holding that the money sought to be recovered in this cause by appellant from the appellee was not paid under protest and duress.

For propositions of law and authorities, we respectfully refer the court to the propositions under our second assignment of error in appellant's brief and the authorities cited thereunder.

50 Fifth. The Court of Civil Appeals erred in refusing to sustain appellant's first proposition under its second assignment of error, said proposition being that "taxes paid under protest, duress or compulsion may be recovered back in an action at law if illegal," and because the court of Civil Appeals erred in holding that the taxes that appellant paid the money for to appellee were not illegal and void, and that the same were not paid under protest and duress.

*Authorities.*

For authorities on this proposition, we respectfully refer the court to authorities cited on page 17 of appellant's brief.

Sixth. The Court of Civil Appeals erred in refusing to sustain appellant's third assignment of error that the court below "erred in sustaining the defendant's general demurrer to the petition of plaintiff, because it appears from the face of plaintiff's said petition and the facts stated therein that the franchise tax laws of the State of Texas, same being chapters 19 and 72 of the General Laws of the 29th Legislature of the State of Texas, are unconstitutional and void, being in contravention of the Constitution of the United States and the Constitution of the State of Texas."

Seventh. The Court of Civil Appeals erred in refusing to sustain appellant's first proposition under its third assignment of error, said proposition being that "chapters 19 and 72 of the General Laws of the 29th Legislature of the State of Texas impair the obligation of the contract entered into between the State of Texas and plaintiff on the 23rd day of March 1901," and because the Court of Civil Appeals erred in holding that the granting of a permit by the State of Texas to appellant to do business as a foreign corporation, on May 23, 1901, for a period of ten years, and its payment for the same, did not constitute a contract between appellant and the State of Texas.

*Authorities.*

For authorities on this proposition, we respectfully refer the court to authorities cited on page 36 of appellant's brief.

Eighth. The Court of Civil Appeals erred in refusing to sustain appellant's second proposition under its third assignment of error, said proposition being that "interstate commerce cannot be taxed or discriminated against in any way," and that "a tax upon a foreign corporation doing purely an interstate commerce like the tax in question is in violation of paragraph 3, section 8, article 1, of the Constitution of the United States," and because the Court of Civil Appeals erred in holding that the tax imposed by chapters 19 and 72 of the General Laws of the 29th Legislature of the State of Texas was not a tax upon interstate commerce.

Ninth. Because the Court of Civil Appeals erred in refusing to sustain appellant's seventh proposition under its third assignment of error, said proposition being that "corporations are persons and are protected by the 14th Amendment to the Constitution of the United States."

Tenth. The Court of Civil Appeals erred in refusing to sustain appellant's eighth proposition under its third assignment of error, said proposition being that "the laws of the 29th Legislature, Chapters 19 and 72 of the State of Texas, are in violation of the 14th amendment of the Constitution of the United States."

Eleventh. The Court of Civil Appeals erred in refusing to sustain appellant's ninth proposition under its third assignment of error, said proposition being that "a state law which attempts to tax that which is beyond its jurisdiction is void and violates provisions of the 14th Amendment to the Constitution of the United States."

*Authorities.*

For authorities on this proposition, we respectfully refer the court to authorities cited on page 77 of Appellant's brief.

Twelfth. The Court of Civil Appeals erred in refusing to sustain appellant's tenth proposition under its third assignment of error, said proposition being that "discrimination taxes are illegal and void and in violation of the Constitution of the United States."

*Authorities.*

For authorities on this proposition, we respectfully refer the court to authorities cited on pages 80 and 81 of appellant's brief.

Thirteenth. Because the Court of Civil Appeals erred in refusing to sustain appellant's eleventh proposition under its third assignment of error, said proposition being that "the tax in question is a property tax."

Fourteenth. The Court of Civil Appeals erred in refusing to sustain appellant's thirteenth proposition under its third assignment of

error, said proposition being that "graduated taxes are illegal, and that chapter 19 of the General Laws of the 29th Legislature of the State of Texas is in violation of the Constitution of the State of Texas, and especially of the provisions of section 48, article 3; and sections 1, 2 and 3 of Article 8 of the Constitution of Texas."

#### *Authorities.*

For authorities on this proposition, we respectfully refer the court to authorities cited on page 96 of appellant's brief.

Fifteenth. The Court of Civil Appeals erred in refusing to sustain appellant's fourteenth proposition under its third assignment of error, said proposition being that "the state cannot, after  
53 having granted a permit to a foreign corporation, tax them greater than domestic corporations."

#### *Statement.*

It is alleged in plaintiff's petition that a permit was granted to it by the State of Texas on the 23rd day of May, 1901, to do business in the State of Texas, and that it paid for the same. See paragraph 1 of Plaintiff's petition, p. 2 of appellant's brief. This fact is not denied by defendant, but admitted by the demurrer.

Sixteenth. The Court of Civil Appeals erred in refusing to sustain appellant's fifteenth proposition under its third assignment of error, said proposition being that "if the tax imposed by chapters 19 and 72, General Laws of 1905 of the State of Texas, is not a property tax, it is an occupation tax and invalid because not equal and uniform upon the same class of subjects."

#### *Authorities.*

For authorities on this proposition, we respectfully refer the court to authorities cited on page 101 of appellant's brief.

Seventeenth. The Court of Civil Appeals erred in refusing to sustain appellant's sixteenth proposition under its third assignment of error, said proposition being that "chapter 19 of the General Laws of the 29th Legislature of Texas is unconstitutional and void because it was not read on three several days in each house of the Legislature as required by section 32, article 3, of the Constitution of Texas," plaintiff's petition alleging that the Constitution was not complied with in this respect and the demurrer of the defendant admitting the allegation to be true.

Eighteenth. The Court of Civil Appeals erred in refusing to sustain appellant's seventeenth proposition under its third assignment of error, said proposition being that "chapter 72 of the Laws  
54 of 1905 was not adopted according to the Constitution of the State of Texas."

Nineteenth. The Court of Civil Appeals erred in refusing to sustain appellants' eighteenth proposition under its third assignment of error, said proposition being that "chapter 19 is unconstitutional  
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and void because it attempts to delegate judicial authority to the Secretary of State to fix penalties and declare forfeitures."

Twentieth. The Court of Civil Appeals erred in refusing to sustain appellant's nineteenth proposition under its third assignment of error, said proposition being that chapter 19 of the Laws of the 29th Legislature of the State of Texas is in violation of the Constitution of the State of Texas in that its title embraces more than one subject.

Twenty-first. The Court of Civil Appeals erred in holding that chapters 19 and 72 of the General Laws of the 29th Legislature of the State of Texas do not impose a tax upon interstate commerce as to foreign corporations.

Twenty-second. The Court of Civil Appeals erred in holding that chapters 19 and 72 of the General Laws of the 29th Legislature of the State of Texas neither impose a property tax nor an occupation tax on foreign corporations, and that the same were not in violation of the Constitution of the State of Texas.

#### *Authorities.*

For authorities under this proposition, we respectfully refer the Court to authorities cited on page 101 of appellant's brief.

Twenty-third. The Court of Civil Appeals erred in holding that the money sought to be recovered from appellee by appellant was not paid by appellant to appellee under duress, and because the Court of Civil Appeals erred in holding that the money was paid to appellee voluntarily by the appellant.

55 Your petitioner further represents that the defendant in error is represented by Hon. R. V. Davidson, Attorney General of the State of Texas, and Claude Pollard, Assistant Attorney General, as attorneys of record.

Wherefore, your petitioner prays for a writ of error in said cause to the end that said cause may be brought before this court, and the aforesaid errors reviewed and corrected.

Respectfully submitted,

BULKLEY, GRAY AND MORE, AND  
J. M. PATTERSON,

*Attorneys for Plaintiff in Error.*

CLERK'S OFFICE, SUPREME COURT.

I, F. T. Connerly, Clerk of the Supreme Court of Texas do hereby certify that the above and foregoing 18 pages contain a true and correct copy of the original application No. 6204, Gaar, Scott & Company, Plaintiffs in error, vs. O. K. Shannon, Defendant in Error, now on file in this office.

[SEAL.]

F. T. CONNERLY, *Clerk.*  
By J. S. MYRICK, *Deputy.*

(Endorsed:) App. No. 6204. Gaar, Scott & Co., vs. O. K. Shannon. Certified Copy of Petition for Writ of Error. Filed in Court of Civil Appeals 3rd Supreme Judicial District, Austin, Texas, Jun. 18, 1909. R. H. Connerly, Clerk.

56 *Judgment of Supreme Court of Texas. Refusing Application for Writ of Error.*

In Supreme Court of Texas.

GAAR, SCOTT &amp; Co.

vs.

O. K. SHANNON.

From Travis County. 3rd District.

MARCH 3RD, 1909.

This day came on to be heard the application of Gaar, Scott & Co. for a writ of error to the Court of Civil Appeals for the Third District, and the same having been duly considered, it is ordered that said application be refused; that the applicant, Gaar, Scott & Company and their surety, National Surety Company, pay all costs incurred on this application.

I. F. T. Connerly, Clerk of the Supreme Court of Texas, hereby certify that the above is a true and correct copy of the judgment rendered by the Supreme Court on the application for writ of error in the above styled cause.

Witness my hand and the seal of said Court, this the 19th day of March, A. D. 1909.

[SEAL.]

F. T. CONNERLY, Clerk.

By J. S. MYRICK, Deputy.

(Endorsed:) Application No. 6204. Gaar, Scott & Co. vs. O. K. Shannon. Copy of judgment in Supreme Court. Application for writ of error refused.

57 *Bill of Costs of Supreme Court of Texas.*

Clerk's Office, Supreme Court.

No. 6204.

GAAR, SCOTT &amp; Co.

vs.

O. K. SHANNON.

*Certified Copy Bill of Costs, Supreme Court.*

Filing Application.....	.50
Docketing Petition.....	.50
Entering Appearance of Counsel.....	.50
Filing Two Briefs.....	.60
Filing Three Papers.....	.90
Entering Orders.....	.59
Entering Judgment on Application.....	1.00
Certified Copy of Judgment.....	1.00
Taxing Costs of Application.....	.50
Certified Copy Bill of Costs.....	1.00
<b>Total.....</b>	<b>\$7.00</b>

I, F. T. Connerly, Clerk of the Supreme Court of Texas, hereby certify that the above copy of the original bill of costs is true and correct.

Witness my hand and seal of said Court, at Austin, this the 19th day of March, 1909.

[SEAL.]

F. T. CONNERLY, *Clerk*.

(Endorsed:) Application No. 6204. Certified Copy Bill of Costs in Supreme Court, Austin. Gaar, Scott & Co. vs. O. K. Shannon. \$7.00.

58      *Petition for Writ of Error to the Supreme Court of the United States.*

In the Court of Civil Appeals of the State of Texas for the 3rd Supreme Judicial District of Texas.

No. —.

GAAR, SCOTT AND COMPANY

vs.

O. K. SHANNON.

To Any Justice of the Supreme Court of the United States, or to the Chief Justice of the Court of Civil Appeals of the State of Texas, for the Third Supreme Judicial District of the State of Texas:

Your petitioner, the Gaar, Scott and Company, a corporation, represents:

That on December 16th, 1908, in the above numbered and entitled cause, pending in the Court of Civil Appeals of the State of Texas, for the Third Supreme Judicial District of Texas, wherein Gaar, Scott & Company, and none other, is appellant, and O. K. Shannon, and none other, is appellee, a judgment was rendered and entered in favor of the said O. K. Shannon and against your petitioner; that on December 31, 1908, your petitioner, the said appellant in said cause, filed its motion for a rehearing of said cause in said Court of Civil Appeals of the State of Texas, which said motion was by said Court of Civil Appeals on January 14, 1909, in all things overruled; that on February 18, 1909, your petitioner, the said appellant in the above numbered and entitled cause, filed its petition and application for writ of error to the Supreme Court of the State of Texas to have said cause removed from said Court of Civil

59      Appeals to said Supreme Court of the State of Texas, and that your petitioner's petition for writ of error to said Supreme Court of the State of Texas, was, in all things denied and refused by said Supreme Court of the State of Texas on March 3rd, 1909, whereby the said judgment of said Court of Civil Appeals of the State of Texas became and is in all things a final judgment in favor of the said O. K. Shannon and against your petitioner.

That the said Court of Civil Appeals of the State of Texas is the

highest court of the said State of Texas in which a decision could be had by your petitioner, the Supreme Court of the State — Texas having refused your petitioner's application for writ of error, as aforesaid, and thereby refused to take jurisdiction of the cause.

And your petitioner says that it is aggrieved by the judgment and proceedings in said suit, and that in said judgment and proceedings had prior thereto in said cause errors were committed to the prejudice of your petitioner, because it says there was in said suit drawn in question the validity of statutes of, and an authority exercised under, the State of Texas, on the ground of their being repugnant to the Constitution and laws of the United States, and that there was drawn in question the validity of the acts of the said O. K. Shannon, appellee in said cause, on the ground of their being repugnant to the Constitution and laws of the United States, and that the decision of said Court of Civil Appeals of the State of Texas was in favor of the validity of said statutes and of the validity of the said acts of the said O. K. Shannon; and that titles, rights, privileges, exemptions and immunities were in said suit claimed by your petitioner under the Constitution and laws of the United States, and the decision in said suit was against the titles, rights, privileges, exemptions and immunities specially set up and claimed therein by your peti-

60 tioner under such constitution and laws, as will more fully appear from your petitioner's petition in said suit, and as will further appear from the first, second and third errors assigned by your petitioner in the said Court of Civil Appeals of the State of Texas, to which Court your petitioner appealed this cause from the judgment of the district court of Travis County, Texas, within and for the 26th judicial district of the State of Texas, and from the judgment of said district court your petitioner prosecuted its appeal to said Court of Civil Appeals for the Third Supreme Judicial District of the State of Texas. And as will further appear from the assignments of error filed by your petitioner with its motion for rehearing in said Court of Civil Appeals, and from its application to the Supreme Court of Texas for a writ of error in this cause, and from the assignment of errors filed herewith, and all of which your petitioner prays Your Honors will read as part hereof.

Your petitioner refers to the assignment of errors filed herewith and prays that the same be considered for the purpose of this petition as a part thereof; and further prays that a writ of error may be allowed and issued herein to the said Court of Civil Appeals of the State of Texas which now has the record in this suit for the removal of said cause into the Supreme Court of the United States, to the end that the errors in said judgment and proceedings in said cause may be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, and that the transcript of the record, proceedings and papers in said cause, duly authenticated, may be sent to the Supreme Court of the United States.

BULKLEY, GRAY AND MORE, AND  
J. M. PATTERSON.

*Attorneys for Gaar, Scott and Company.*

61 Allowed on this the 16th day of June, A. D. 1909.

H. C. FISHER,  
*Chief Justice of the Court of Civil Appeals of  
 the State of Texas for the 3rd Supreme  
 Judicial District of the State of Texas.*

(Endorsed:) No. —. Gaar, Scott & Company vs. O. K. Shannon,  
 Application for Writ of Error. Filed in Court of Civil Appeals 3rd  
 Supreme Judicial District, Austin, Texas, June 16th, 1909. R. H.  
 Connerly, Clerk.

*Assignments of Error.*

In the Court of Civil Appeals of the State of Texas for the 3rd  
 Supreme Judicial District of Texas.

No. —.

GARR, SCOTT AND COMPANY, Plaintiff in Error,  
 vs.  
 O. K. SHANNON, Defendant in Error.

Now comes the plaintiff in error, Garr, Scott and Company, and,  
 on writ of error from the Supreme Court of the United States, make  
 and file the following assignments of error, and say that in the  
 records and proceedings in said cause, the Court of Civil Appeals of  
 the State of Texas, for the Third Supreme Judicial District of the  
 State of Texas, erred in this:

First.

The Court of Civil Appeals of the State of Texas, having construed  
 the act of the Legislature of the State of Texas, approved March 1,  
 1905, entitled,

62 "An Act to amend Articles 5243i and 5243j of an Act entitled  
 'An Act to amend articles 5243i, 5243j and 5243k of an Act en-  
 titled 'An Act to amend Articles 5243e, 5243i, 5243j and  
 5243k of Chapter 9, Title 104 of the Revised Civil Statutes  
 relating to the taxation of insurance, telephone, sleeping and  
 dining car and other corporations, and to provide for forfeiting the  
 charters of domestic corporations and permits of foreign corporations  
 to do business in this State for failure to pay the franchise tax levied  
 by this Act, and to define and prescribe the notice to be given to said  
 corporations previous to said forfeiture, and to provide adequate  
 penalties for a violation of this Act,' passed at the present session and  
 approved April 30th, 1897,' same being Chapter 120 of the General  
 Laws of the State of Texas, passed at the Regular Session of the 25th  
 Legislature, in relation to the amounts of the annual franchise tax  
 on domestic and foreign corporations, and the method of computing  
 the same and the enforcement of the payment of such tax." And

said Court of Civil Appeals, having also construed the Act of the Legislature of the State of Texas, Approved April 11, 1905, entitled,

"An Act to define the method of computing the annual franchise tax payable by private domestic and foreign corporations; to repeal all laws and parts of laws in conflict with the provisions of this act; and declaring an emergency." That said acts are known as Chapters 19 and 72 of the General Laws of the 29th Legislature of the State of Texas, and are pages 21 and 101 of said General Laws.

That on May 23rd, 1901, a permit was granted by the State of Texas to plaintiff in error to do business in said State of Texas for a period of ten years from May 23rd, 1901, as a private foreign corporation, under the provisions of chapter 17 of Title 21 of the Revised Civil Statutes of 1895 of the State of Texas, said chapter consisting of Articles 745 to 749 of said Revised Statutes of the State of Texas, and expressly authorizing the issuance of said permit to

63 this plaintiff in error for said period of ten years, and this plaintiff in error paid to said State of Texas, for its said permit and the privilege of doing business in the State of Texas, under its said permit the price or fee charged by said State of Texas, said fee being the fee prescribed by Article 2439 of the Revised Statutes of the State of Texas of 1895; and that said acts of the 29th Legislature of the State of Texas, as to this plaintiff in error, are repugnant to and violate the provisions of section 10 of Article 2 of the Constitution of the United States, providing that no state shall pass any law "impairing the obligation of contracts," it appearing from said acts of the 29th Legislature of the State of Texas that an annual fee for the privilege of doing business in the State of Texas is imposed upon foreign corporations in addition to the fee paid by your petitioner to the State of Texas on May 23rd, 1901, for such privilege for a term of ten years, and for an annual sum greatly larger than said fee so paid by plaintiff in error to the State of Texas on May 23rd, 1901, and the Court of Civil Appeals of the State of Texas erred in holding that said acts of the 29th Legislature of the State of Texas were not in violation of said provision of the Constitution of the United States, forbidding any state to pass any law "impairing the obligation of contracts."

#### Second.

It appearing from the record herein and from said acts of the 29th Legislature of the State of Texas that foreign corporations engaged in business in the State of Texas are required and compelled by said acts of the 29th Legislature of the State of Texas, the same being chapters 19 and 72 of the General laws of said 29th Legislature, to pay to the State of Texas an annual franchise tax not only upon their capital stock as a basis for such tax but also upon the surplus and undivided profits of each year from whatever source derived, the said Court of Civil Appeals erred in holding that said act- of the 29th Legislature of the State of Texas, was valid  
64 and not contrary to, and in violation of section 8 of Article 1 of the Constitution of the United States conferring upon

Congress the power to regulate commerce with foreign nations and among the several states and with the Indian Tribes.

Third.

The Court of Civil Appeals of the State of Texas erred in holding that said acts of the 29th Legislature of the State of Texas, known as Chapters 19 and 72 of the General Laws of said 29th Legislature, were not in violation of section 8 of the First Article of the Constitution of the United States, conferring upon Congress the power to regulate commerce among the several states, in that it appears from said acts of the said 29th Legislature of the State of Texas that a discriminating tax is imposed by them against foreign corporations in favor of domestic corporations upon interstate business done by said foreign corporations.

Fourth.

The said Court of Civil Appeals of the State of Texas erred in holding that said Acts of the 29th Legislature of the State of Texas, known as chapters 19 and 72 of the said 29th Legislature, were not in violation of *that* Fourteenth Amendment of the Constitution of the United States, providing that no state shall deprive any person of life, liberty or property without due process of law, in that it appears from said acts of the said 29th Legislature that the Secretary of the State of Texas is empowered to adjudge and declare forfeitures of permits of foreign corporations without judicial intervention and ascertainment, and to thereby deprive foreign corporations of property and rights without due process of law.

Wherefore, plaintiff in error prays that the judgment of the Court of Civil Appeals of the State of Texas be reversed and that  
65 this cause be remanded, and for such other proceedings as law and justice may require.

BULKLEY, GRAY AND MORE AND  
J. M. PATTERSON,

*Attorneys for Gaar, Scott and Company.*

Endorsed:) No. —. Gaar, Scott and Company, plaintiff in Error, vs. O. K. Shannon, Defendant in Error. Assignments of Error. Filed in Court of Civil Appeals, 3rd Supreme Judicial District, Austin, Texas, June 16th, 1909. R. H. Connerly, Clerk.

*Writ of Error Bond.*

No. —.

GAAR, SCOTT &amp; COMPANY, Plaintiff in Error,

vs.

O. K. SHANNON, Defendant in Error.

Know all men by these presents that we, Gaar, Scott & Company, as principal, and the National Surety Company, and ——— as suret— are held and firmly bound — O. K. Shannon in the full and just sum of Two Hundred Dollars, to be paid to the said O. K. Shannon, his executors, administrators or assigns: to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally by these presents. Sealed with our seals and dated this June 16th, A. D. 1909.

Whereas, lately at a term of the Court of Civil Appeals of the State of Texas for the Third Supreme Judicial District of the State of Texas in *and* suit pending in said court between Gaar, Scott and Company and O. K. Shannon, a judgment was rendered against the said Gaar, Scott and Company, plaintiff in error herein, 66 and the said Gaar, Scott and Company, having obtained a writ of error and filed a copy thereof in the clerk's office in said Court to reverse the judgment in the aforesaid suit, and a citation directed to the said O. K. Shannon citing and admonishing said O. K. Shannon to be and appear at a Supreme Court of the United States to be holden at Washington within thirty days from the date thereof.

Now, the condition of the above obligation is such, that if said Gaar, Scott & Company shall prosecute its writ of error to effect and answer all damages and costs if it fails to make its plea good, then the above obligation to be void; else to remain in full force and effect.

GAAR, SCOTT &amp; COMPANY,

*Principal,*By Its Attorneys, BULKLEY, GRAY & MORE AND  
J. M. PATTERSON.

NATIONAL SURETY COMPANY,

*Surety.*By Its Attorney in Fact, JAMES H. ROBERTSON, *Surety.*

THE UNITED STATES OF AMERICA,

*Western District of Texas, ss:*

I, D. H. Hart, Clerk of the Circuit Court of the United States for the Western District of Texas, in the Fifth Circuit and District aforesaid, do hereby certify that *that* the National Surety Company, whose name appears signed to the annexed bond is in my opinion good and ample security for the amount therein specified, and that if said bond was offered to me for approval the same would be accepted and approved.

To certify which I have hereunto set my hand and official seal, this the 16th day of June, A. D. 1909.

[SEAL.]

D. H. HART,  
*Clerk of the United States Circuit  
Court, Western District of Texas.*

67 The above and foregoing bond approved this the 19th day of June, A. D. 1909.

H. C. FISHER,  
*Chief Justice of the Court of Civil Appeals of  
the State of Texas for the Third Supreme  
Judicial District of the State of Texas.*

Know all men by these presents that the National Surety Company, a corporation duly organized and existing under the laws of the State of New York, and having its principal offices in the City of New York, hath made, constituted and appointed, and does by these presents make, constitute and appoint James H. Robertson of Austin and State of Texas, its true and lawful attorney, with full power and authority hereby conferred in its name, place and stead, to sign, execute and acknowledge a certain cost bond on behalf of Garr, Scott & Company in its action with O. K. Shannon, not exceeding the sum of Two Hundred (\$200) Dollars, and to bind the National Surety Company thereby as fully and to the same extent as if such bonds were signed by the President, sealed with the common seal of the company, and duly attested by its Secretary, hereby ratifying and confirming all the acts of said attorney pursuant to the power herein given. This power of attorney is made and executed pursuant to and by authority of the following By-Law adopted by the Board of Directors of the National Surety Company at a meeting duly called and held on the Fourth day of February, 1908.

"ARTICLE XII. Resident Officers and Attorneys-in-fact.

"SECTION 1. The President or First Vice-President, may from time to time appoint resident vice presidents, resident assistant secretaries and attorneys in fact, to represent and act for and on behalf of the Company, and either the President, first vice-president, the board of directors or the executive committee may at any time remove any such resident vice-president, resident assistant secretary or attorney in fact and revoke the power and the authority given him.

"SECTION 4. Attorneys-in-fact. Attorneys-in-fact may be given full power and authority to execute for and in the name and on behalf of the Company, any and all bonds, recognizances, contracts of indemnity and other writings obligatory in the nature of a bond, recognizance or conditional undertaking; and any such instrument, executed by any such attorney-in-fact shall be as binding upon the company as if signed by the president and sealed and attested by the secretary."

In witness whereof the National Surety Company has caused these presents to be signed by its 1st Vice-President and its corporate seal to

be hereto affixed, duly attested by its Assistant Secretary this 18th day of May, A. D. 1909.

NATIONAL SURETY COMPANY,  
By WILLIAM J. GRIFFIN,  
1st Vice-President.

Attest:

JOHN C. DRAPER, JR.,  
[SEAL.] Assistant Secretary.

STATE OF NEW YORK,  
County of New York, ss:

On this 18th day of May, A. D. 1909, before me personally came William J. Griffin to me known, who being by me duly sworn did depose and say that he resides in the City of New York; that he is the First Vice-President of the National Surety Company, the corporation described in and which executed the above instrument; that he knows the seal of said corporation; that the seal affixed to the said instrument is such corporate seal; that it was so affixed by order of the Board of Directors of said Corporation, and that he signed his name thereto by like order.

[SEAL.] ETTA B. GEWECKE,  
Notary Public for County of Kings.

Certificate filed in New York, Queens, Richmond, Westchester, and Nassau counties.

(Endorsed:) No. —. Garr, Scott and Company vs. O. K. Shannon. Bond. Filed in Court of Civil Appeals 3rd Supreme Judicial District, Austin, Texas, June 19th, 1909. R. H. Connerly, Clerk.

*Writ of Error.*

In the Court of Civil Appeals of the State of Texas for the 3rd Supreme Judicial District of Texas.

GAAR, SCOTT & COMPANY, Plaintiff in Error,  
vs.  
O. K. SHANNON, Defendant in Error.

*Writ of Error.*

THE UNITED STATES OF AMERICA, ss:

The President of the United States of America to the Honorable the Judges of the Court of Civil Appeals of the State of Texas for the Third Supreme Judicial District of Texas, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment, of a plea which is in the said Court of Civil Appeals of the State of Texas, before you or some of you, being the highest

70 court of law or equity of said State in which a decision could be had in said suit between Gaar, Scott and Company, a corporation, plaintiff in error, and O. K. Shannon, defendant in error, the Supreme Court of the State of Texas having refused to allow a writ of error herein and thereby refused to take jurisdiction of said cause, wherein was drawn in question the construction of the Constitution of the United States and the validity of certain statutes of the State of Texas, and also the authority of the said O. K. Shannon to collect moneys from the said Gaar, Scott & Company under said statutes of the State of Texas, on the ground that said statutes of the State of Texas were repugnant and in violation to the Constitution of the United States, and the decision of said Court of Civil Appeals was in favor of their validity, and against the title, right, privilege, exemption or immunity specially set up or claimed under the Constitution of the United States by plaintiff in error, and manifest error hath happened to the great damage of the said Gaar, Scott and Company, as by its application appears, we being willing that error, if any hath been, should be duly corrected, and full and speedy justice be done to the party aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you—in said Supreme Court at Washington within thirty days from the date hereof; that the records and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error which of right and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, this the 19th day of June, in the year of our Lord 1909.

[SEAL.]

D. H. HART,

*Clerk of the United States Circuit Court for  
the Western District of Texas.*

71 Allowed by:

H. C. FISHER,

*Chief Justice of the Court of Civil Appeals of  
the State of Texas, for the Third Supreme  
Judicial District of the State of Texas.*

(Endorsed:) In the Court of Civil Appeals of the State of Texas, for the Third Supreme Judicial District of the State of Texas. Gaar, Scott & Company, Plaintiff in Error, vs. O. K. Shannon, defendant in Error. Writ of Error. Filed in Court of Civil Appeals, 3rd Supreme Judicial District, Austin, Texas, June 21, 1909. R. H. Connerly, Clerk.

*Duplicate Writ of Error.*

In the Court of Civil Appeals of the State of Texas for the 3rd  
Supreme Judicial District of Texas.

GAAR, SCOTT & COMPANY, Plaintiff in Error,

vs.

O. K. SHANNON, Defendant in Error.

*Writ of Error.*

THE UNITED STATES OF AMERICA, ss:

The President of the United States of America to the Honorable the  
Judges of the Court of Civil Appeals of the State of Texas for the  
Third Supreme Judicial District of Texas, Greeting:

Because in the record and proceedings, as also in the rendition  
of the judgment, of a plea which is in the said Court of Civil  
Appeals of the State of Texas, before you, or some of  
72 you, being the highest court of law or equity of said State in  
which a decision could be had in said suit between Gaar,  
Scott & Company, a corporation, plaintiff in error, and O. K. Shan-  
non, defendant in error, the Supreme Court of the State of Texas  
having refused to allow a writ of error therein and thereby refused  
to take jurisdiction of said cause, wherein was drawn in question the  
construction of the Constitution of the United States and the validity  
of certain statutes of the State of Texas, and also the authority of the  
said O. K. Shannon to collect moneys from the said Gaar, Scott &  
Company under said statutes of the State of Texas, on the ground that  
said statutes of the State of Texas were repugnant and in violation to  
the Constitution of the United States, and the decision of said Court  
of Civil Appeals was in favor of their validity, and against the title,  
right, privilege exemption or immunity specially set up or claimed  
under the Constitution of the United States by plaintiff in error, and  
manifest error hath happened to the great damage of the said Gaar,  
Scott & Company, as by its application appears, we being willing  
that error, if any hath been, should be duly corrected and full and  
speedy justice be done to the party aforesaid in this behalf, do  
command you, if judgment be therein given, that then under your  
seal, distinctly and openly you send the record and proceedings  
aforesaid, with all things concerning the same, to the Supreme Court  
of the United States, together with this writ so that you — in said  
Supreme Court at Washington within thirty days from the date  
hereof; that the records and proceedings aforesaid being inspected,  
the said Supreme Court may cause further to be done therein to  
correct that error which of right and according to the laws and cus-  
toms of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the

73 United States, this the — day of June, in the year of our Lord 1909.

*Clerk of the United States Circuit Court  
for the Western District of Texas.*

Allowed by:

H. C. FISHER,  
*Chief Justice of the Court of Civil Appeals of  
the State of Texas for the Third Supreme  
Judicial District of the State of Texas.*

(Endorsed:) In the Court of Civil Appeals of the State of Texas, for the Third Supreme Judicial District of the State of Texas. Gaar, Scott & Company, Plaintiff in Error, vs. O. K. Shannon, Defendant in Error. Writ of Error. Filed in Court of Civil Appeals, 3rd Supreme Judicial District, Austin, Texas, June 19th, 1909, R. H. Connerly, Clerk.

*Citation in Error.*

THE UNITED STATES OF AMERICA,  
*Fifth Judicial District, ss:*

The President of the United States to O. K. Shannon, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States at Washington within thirty days from the date hereof pursuant to writ of error filed in the Clerk's office of the Court of Civil Appeals of the State of Texas for the Third Supreme Judicial District of the State of Texas, wherein Gaar, Scott & Company is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered  
74 against the said Plaintiff in Error, as in said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, this 16th day of June, in the year of our Lord, One Thousand Nine Hundred and Nine.

Signed this the 16th day of June A. D. 1909.

H. C. FISHER,  
*Chief Justice of the Court of Civil Appeals of  
the State of Texas for the 3rd Supreme Ju-  
dicial District of Texas.*

Attest with the seal of the United States Circuit Court for the Western District of Texas, this the 19th day of June, 1909.

[SEAL.]

D. H. HART,  
*Clerk of the Circuit Court of the United States  
for the Western District of Texas.*

Due service of the above and foregoing citation is hereby acknowledged, this the 19th day of June, A. D. 1909.

R. V. DAVIDSON,  
*Attorney General, Attorney for O. K. Shannon.*

(Endorsed:) No. —. Gaar, Scott and Company, vs. O. K. Shannon. Citation in Error. Marshal's Return. Filed in Court of Civil Appeals, Third Supreme Judicial District, Austin, Texas, June 21, 1909. R. H. Connerly, Clerk.

75 *Duplicate Citation in Error.*

THE UNITED STATES OF AMERICA,  
*Fifth Judicial District, ss:*

The President of the United States to O. K. Shannon, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States at Washington within thirty days from the date hereof pursuant to writ of error filed in the Clerk's Office of the Court of Civil Appeals of the State of Texas, for the Third Supreme Judicial District of the State of Texas, wherein Gaar, Scott & Company is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said Plaintiff in Error as in said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, this 16th day of June, in the year of our Lord One Thousand Nine Hundred and Nine.

Signed this the 16th day of June, A. D. 1909.

H. C. FISHER,  
*Chief Justice of the Court of Civil Appeals  
of the State of Texas, for the Third  
Supreme Judicial District of Texas.*

[SEAL.]

Attest with the seal of the United States Circuit Court for the Western District of Texas, this the 19th day of June 1909.

D. H. HART,  
*Clerk of the Circuit Court of the United  
States for the Western District of Texas.*

76 Due service of the above and foregoing citation is hereby acknowledged, this the 19th day of June, A. D. 1909.

R. V. DAVIDSON,  
*Attorney General, Attorney for O. K. Shannon.*

(Endorsed:) No. —. Gaar, Scott & Company, vs. O. K. Shannon. Citation in Error. Marshal's Return. Filed in Court of Civil Appeals, Third Supreme Judicial District, Austin, Texas, June 21, 1909. R. H. Connerly, Clerk.

*Bill of Costs of Court of Civil Appeals.*

Filing Record .....	.50
Docketing Cause .....	.50
Appearances .....	1.00
Filing Briefs .....	.80
Filing and Entering Motions.....	.35
Orders .....	2.00
Filing 12 Extra Papers.....	1.20
Continuances .....	.40
Judgment .....	1.00
Taxing Costs .....	.50
Mandate .....	1.50
Recording Opinion .....	5.00
Certified Copy Bill of Costs.....	.75
Certified Copy Orders to Sup. Crt. of Texas.....	2.00
Notices .....	6.00
Copy of Motion.....	2.50
Issuing 1 Precept.....	1.00
Sheriff's Fees .....	1.00
Costs Supreme Court of Texas.....	7.00
Transcript to Supreme Court of United States.....	39.00
<b>Total .....</b>	<b>\$74.00</b>

77

*Clerk's Certificate.*

I, R. H. Connerly, Clerk of the Court of Civil Appeals of the Third Supreme Judicial District of the State of Texas do hereby certify that the foregoing 76 pages contain true and correct copies of all the proceedings had in the District Court of Travis County, Texas; said Court of Civil Appeals and the Supreme Court of Texas, as the same appear on file in my office; also of the application for writ of error, assignments of error, bond for writ of error to the Supreme Court of The United States of America, writ of error, duplicate writ of error, citation in error and duplicate citation in error from the records filed in my said office. I also certify that attached hereto, hereafter appear the original writ of error and the original citation in error, in the cause entitled in said Court of Civil Appeals—Gaar, Scott & Company, Appellant vs. O. K. Shannon, Appellee, No. 4174, appealed from the District Court of Travis County, Texas.

Witness my hand and the seal of said court this the 2nd day of July, A. D. 1909.

[Seal Court of Civil Appeals of the State of Texas.]

R. H. CONNERLY,

*Clerk of the Court of Civil Appeals  
of the Third Supreme Judicial  
District of the State of Texas.*

78 In the Court of Civil Appeals of the State of Texas for the  
3rd Supreme Judicial District of Texas.

GAAR, SCOTT & COMPANY, Plaintiff in Error,

VS.

O. K. SHANNON, Defendant in Error.

*Writ of Error.*

THE UNITED STATES OF AMERICA, ss:

The President of the United States of America to the Honorable the  
Judges of the Court of the Civil Appeals of the State of Texas for  
the Third Supreme Judicial District of Texas, Greeting:

Because in the record and proceedings, as also in the rendition of  
the judgment, of a plea which is in the said Court of Civil Appeals  
of the State of Texas, before you, or some of you, being the highest  
court of law or equity of said State in which a decision could be had  
in said suit between Gaar, Scott and Company, a corporation, plain-  
tiff in error, and O. K. Shannon, defendant in error, the Supreme  
Court of the State of Texas having refused to allow a writ of error  
therein and thereby refused to take jurisdiction of said cause, wherein  
was drawn in question the construction of the Constitution of the  
United States and the validity of certain statutes of the State of  
Texas, and also the authority of the said O. K. Shannon to collect  
moneys from the said Gaar, Scott and Company under said statutes  
of the State of Texas, on the ground that said statutes of the State  
of Texas were repugnant and in violation to the Constitution of the  
United States, and the decision of said Court of Civil Appeals was  
in favor of their validity, and against the title, right, privilege, ex-  
emption or immunity specially set up or claimed under the Consti-  
tution of the United States by plaintiff in error, and manifest error  
hath happened, to the great damage of the said Gaar, Scott and  
Company, as by its application appears, we being willing that error,  
if any hath been, should be duly corrected, and full and speedy jus-  
tice be done to the party aforesaid in this behalf, do command you,  
if judgment be therein given, that then under your seal, distinctly  
and openly, you send the record and proceedings aforesaid, with all  
things concerning the same, to the Supreme Court of the United  
States, together with this writ, so that you — in said Supreme  
Court at Washington within thirty days from the date hereof;  
that the records and proceedings aforesaid being inspected,  
the said Supreme Court may cause further to be done therein to  
correct that error which of right and according to the laws and  
customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the

United States, this the 19th day of June, in the year of our Lord, 1909.

[The Seal of the U. S. Circuit Court, Western Dist. Texas, Austin.]

D. H. HART,

*Clerk of the United States Circuit Court  
for the Western District of Texas.*

Allowed by:

H. C. FISHER,

*Chief Justice of the Court of Civil  
Appeals of the State of Texas, for  
the Third Supreme Judicial Dis-  
trict of the State of Texas.*

[Endorsed:] Filed in Court of Civil Appeals 3rd Supreme Judicial District, Austin, Texas, Jun. 21, 1909. R. H. Connerly, Clerk

80 [Endorsed:] 6. O. In the Court of Civil Appeals of the State of Texas, for the Third Supreme Judicial District of the State of Texas. Gaar, Scott & Company, Plaintiff in Error, vs. O. K. Shannon, Defendant in Error. Writ of Error.

81 THE UNITED STATES OF AMERICA,  
*Fifth Judicial District, ss:*

The President of the United States to O. K. Shannon, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States at Washington within thirty days from the date hereof pursuant to writ of error filed in the Clerk's Office of the Court of Civil Appeals of the State of Texas, for the Third Supreme Judicial District of the State of Texas, wherein Gaar, Scott and Company, is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said Plaintiff in Error, as in said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, this 16th day of June, in the year of our Lord, One Thousand, Nine Hundred and Nine.

Signed this the 16th day of June, A. D. 1909.

[The Seal of the U. S. Circuit Court, Western Dist. Texas, Austin.]

H. C. FISHER,

*Chief Justice of the Court of Civil Appeals  
of the State of Texas for the Third  
Supreme Judicial District of Texas.*

Attest with the seal of the United States Circuit Court for the Western District of Texas, this the 19th day of June, 1909.

D. H. HART,

*Clerk of the Circuit Court of the United  
States for the Western District of Texas.*

Due service of the above and foregoing citation is hereby acknowledged, this the 19th day of June, A. D. 1909.

R. V. DAVIDSON,

*Attorney General, Attorney for O. K. Shannon.*

[Endorsed:] 8. No. —. Gaar, Scott and Company, vs. O. K. Shannon. Citation in Error. Marshal's Return. Filed in Court of Civil Appeals 3rd Supreme Judicial District, Austin, Texas, Jun. 21, 1909. R. H. Connerly, Clerk.

Endorsed on cover: File No. 21,751. Texas, 3d Supreme Judicial District, Court of Civil Appeals. Term No. 88. Gaar, Scott & Company, plaintiffs in error, vs. O. K. Shannon. Filed July 10th, 1909. File No. 21,751.

23

Office Supreme Court, U. S.  
FILED.

SEP 29 1911

JAMES H. MCKENNEY,  
CLERK.

NO. 21751

IN THE  
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1911.

No. 88

GAAR SCOTT & COMPANY,

Plaintiff in Error.

*vs.*

O. K. SHANNON,

Defendant in Error.

BRIEF FOR PLAINTIFF IN ERROR.

C. E. MORE,

*Attorney for Plaintiff in Error.*

ALMON W. BULKLEY,  
J. L. PATTERSON,  
*Of Counsel.*

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IN THE  
**SUPREME COURT OF THE UNITED STATES**

OCTOBER TERM, A. D. 1911.

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No. 88

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GAAR SCOTT & COMPANY,

Plaintiff in Error.

*vs.*

O. K. SHANNON,

Defendant in Error.

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**BRIEF FOR PLAINTIFF IN ERROR.**

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MAY IT PLEASE THE COURT:

This is a suit brought by plaintiff in error against defendant in error to recover from the defendant in error the sum of \$287 paid on or about April 28, 1905, and the sum of \$288 paid on or about April 30, 1906, to defendant in error, both payments being made under protest, for a purported franchise tax claimed of the plaintiff in error under certain purported acts of the Twenty-ninth Legislature of the State of Texas, and known as Chapters 19 and 72 of the Acts of 1905, on the ground that said Acts are unconstitutional and void, as being in violation of various provisions of the Constitution of the United States, and also of the State of Texas.

The petition sets forth facts on which it is claimed that the tax is void; that the law on which it is based is unconstitutional, and that plaintiff in error has clearly the right to recover it back.

The allegations in the petition are in part as follows (Tr., 1 to 7) :

“Your petitioner, the Gaar, Scott & Company, complaining of O. K. Shannon, hereinafter styled defendant, respectively alleges and shows that your petitioner is a private corporation, duly incorporated under and by virtue of the laws of the State of Indiana, that your petitioner has its domicile and principal place of business in the City of Richmond, in the County of Wayne, State of Indiana, and that your petitioner has now and has continuously for a long time prior hereto, to-wit: since on or about May 23, 1901, had a permit to do business in the State of Texas; and that the defendant resides in Travis County, State of Texas. And for cause of action your petitioner alleges and shows the following:

“1. That heretofore, to-wit: on or about the 23d day of May, A. D. 1901, a permit was granted your petitioner, under the General Laws of Texas, to do business in the State of Texas, as a private foreign corporation for pecuniary gain and profit, for a period of ten years, by the Secretary of State of the State of Texas, and that your petitioner on said date last mentioned paid to the said Secretary of the State of Texas, all fees required of it for its said permit to do business in the State of Texas by the General Laws of said State of Texas then in force.

“2. That after said permit had been granted to your petitioner and paid for, as aforesaid, your petitioner received a notice from the Secretary of the State of Texas, on or about March 3, A. D. 1905, notifying your petitioner, by a printed notice or circular issued out of the office of the said Secretary of State, to the effect that the Legislature of the State of Texas had passed and put into force a purported Act known as Chapter 19 of the General Laws of the State of Texas passed by the Twenty-ninth Legislature of the State of Texas at its regular session A. D. 1905, and that your petitioner would be required to pay as a private foreign corporation the tax imposed by said purported Act of the Legislature of the State of Texas to the Secretary of State of the State of Texas by the 1st day of May, A. D. 1905, and that on failure of your petitioner to pay to said Secretary of State said tax by the 1st day of May, A. D. 1905, it would be and become liable to pay a penalty of twenty-five per cent of the amount of the tax sought to be imposed upon it by said purported Act of the Twenty-ninth Legislature of the State of Texas, for the year beginning May 1, 1905, and ending May 1, 1906, and that if the amount of said tax and penalty was not paid by your petitioner by the 1st day of July thereafter, its said permit to do business in the State of Texas would be forfeited and cancelled by the said Secretary of State without judicial ascertainment, and that after such forfeiture your petitioner would be deemed an outlaw and denied not only the right to do business in the State of Texas, but also the right to either sue or defend in any of the courts of the State of

Texas, and also the right to set up and ask any affirmative relief on all causes of action accruing to it prior to such forfeiture. That at the time of the passage of the purported Act of the Twenty-ninth Legislature of the State of Texas, said purported Act being Chapter 19 of the General Laws of the State of Texas passed by said Twenty-ninth Legislature at its regular session, A. D. 1905, your petitioner had a large amount of debts owing to it by residents and citizens of the State of Texas, a large portion of said debts were not due and payable until long after May 1, 1905, and July 1, 1905. And your petitioner further alleges that the said Twenty-ninth Legislature of the State of Texas passed at its regular session A. D. 1905, another purported Act, known as Chapter 72 of the Twenty-ninth Legislature of the State of Texas, A. D. 1905, and that said purported law attempted to provide and prescribe how the tax sought to be imposed by the purported Act known as Chapter 19 of the Twenty-ninth Legislature should be computed, and to declare certain acts of corporate officers to be a misdemeanor. That in order to prevent the Secretary of the State of Texas from attempting to impose and exact said penalty of twenty-five per cent of the amount of said tax sought to be imposed by said purported Acts of the Twenty-ninth Legislature of the State of Texas on your petitioner, and to prevent the said Secretary of State from declaring your petitioner's permit to do business in the State of Texas forfeited, and thereby deprive it not only of the right to thereafter do business in the State of Texas, but also of its right to sue or defend in any of the courts

of said State of Texas and of being allowed any affirmative relief on any cause of action accruing to it prior to such forfeiture prescribed and provided in said purported Acts of the Twenty-ninth Legislature of the State of Texas, your petitioner paid to O. K. Shannon, on or about April 28, 1905, the sum of two hundred and eighty-seven dollars (\$287), as the tax imposed by said purported Acts of the Twenty-ninth Legislature of the State of Texas upon your petitioner for the year beginning May 1, 1905, and ending May 1, 1906; that the said O. K. Shannon at the time the payment of the said sum of two hundred and eighty-seven dollars (\$287) was made by your petitioner to him, as aforesaid, claimed to have the right and authority as Secretary of the State of Texas, to exact the payment of said sum of money and to receive the same from your petitioner, and to impose and enforce the penalties prescribed and provided by said purported Acts of the Twenty-ninth Legislature of the State of Texas, and that in order to prevent the said O. K. Shannon from adjudging and declaring without judicial ascertainment or intervention that your petitioner was liable for the said twenty-five per cent penalty prescribed by said purported Acts of the Twenty-ninth Legislature as aforesaid, and also to prevent him from declaring and adjudging, without judicial ascertainment and intervention, that your petitioner's permit to do business in the State of Texas was forfeited and cancelled, and that it was no longer entitled to either sue or defend in any of the courts of the State of Texas or to ask affirmative relief on any cause of action accruing to it prior to said for-

feiture and cancellation of its permit to do business in the State of Texas by the said O. K. Shannon, as aforesaid, your petitioner did pay to the said O. K. Shannon the sum of two hundred and eighty-seven dollars (\$287), on or about April 28, 1905, under duress and under protest; that your petitioner protested against the payment by it of said sum of two hundred and eighty-seven dollars (\$287) to the said O. K. Shannon at the time it paid same to him upon the ground that the said purported Acts of the Twenty-ninth Legislature of the State of Texas under which the said O. K. Shannon held that your petitioner was liable to pay said sum of two hundred and eighty-seven dollars (\$287), as a tax were illegal and void as in contravention of the Constitution of the State of Texas, and of the Constitution of the United States. And your petitioner further alleges that at the time it paid the said O. K. Shannon the said sum of two hundred and eighty-seven dollars (\$287), as aforesaid, that it not only paid same under protest as aforesaid, but that it also then and there notified him in writing that it reserved the right to and would institute suit to recover said sum of two hundred and eighty-seven dollars (\$287) from him, and that its said protest and notice were in writing and substantially as follows:

“We beg to advise you that we pay this tax under protest, on the ground that the franchise tax law of your State is in violation of the Constitution of the State of Texas, also in violation of the Constitution of the United States, and it is, therefore, void. We consider that this franchise tax is illegal, and we reserve the right to recover back the amount

we have paid in the event that it shall be decided that the law is unconstitutional, and that the tax was illegally imposed.'

"And your petitioner further alleges that its capital stock on May 1, 1905, was the sum of four hundred thousand dollars (\$400,000), and that it had then on hand a surplus of property of seven hundred thousand and thirty-seven two hundred and eleven dollars and twenty cents, and that said sum of two hundred and eighty-seven dollars (\$287) paid by it to O. K. Shannon, as aforesaid, was exacted by him from your petitioner as a tax due from your petitioner on said capital stock and surplus under said purported Acts of the Twenty-ninth Legislature of the State of Texas.

"3. And your petitioner further alleges that heretofore, to-wit: on or about April 30, 1906, it paid to the said O. K. Shannon the further sum of two hundred and eighty-eight dollars (\$288), as tax under said purported Acts of the Twenty-ninth Legislature of the State of Texas, for the year beginning May 1, 1906, and ending May 1, 1907, in order to prevent the said O. K. Shannon from adjudging and declaring, without judicial ascertainment or intervention, your petitioner liable for the said twenty-five per cent penalty on the amount of tax claimed by him to be due by your petitioner under said purported Acts of the Twenty-ninth Legislature of the State of Texas, for the year beginning May 1, 1906, and ending May 1, 1907, and also to prevent him from adjudging and declaring, without judicial ascertainment or intervention, your petitioner's permit to do business in the State of

Texas, forfeited and cancelled, and thereby attempting to deprive it not only of the right to do business in Texas, without judicial ascertainment or intervention, but also of the right to sue or defend in any of the courts in the State of Texas, and from asking or seeking affirmative relief on any cause of action in the courts of Texas accruing to it prior to said forfeiture. That your petitioner also paid the sum of two hundred and eighty-eight dollars (\$288), under protest in writing against the payment of the same to him at the time said payment was made, and that at the time of payment the said sum of two hundred and eighty-eight dollars (\$288), to him, it protested against paying the same to him upon the ground that said purported Acts of the Twenty-ninth Legislature of the State of Texas, were illegal and void as in contravention of the Constitution of the State of Texas, and of the Constitution of the United States; and plaintiff further alleges that it notified the said O. K. Shannon at the time it paid said sum of two hundred and eighty-eight dollars (\$288), to him, as aforesaid, that it reserved the right to and would institute suit against him to recover from him the said sum of two hundred and eighty-eight dollars (\$288), and that its said protest and notice were in writing and substantially as follows:

“ ‘We beg to advise you that we pay this tax under protest, on the ground that the franchise tax law of your State is in violation of the Constitution of the State of Texas, and also the Constitution of the United States, and it is therefore void. We reserve the right to recover back the amount of taxes

we have paid in the event that it shall be decided that the law is unconstitutional.'

"And your petitioner further alleges that its capital stock on May 1, 1906, was the sum of four hundred thousand dollars (\$400,000) and that its surplus of the property then on hand was the sum of seven hundred and fifty-three thousand one hundred and eighty-eight dollars, and that said sum of two hundred and eighty-eight dollars (\$288), paid by it to the said O. K. Shannon as aforesaid, was exacted by him from your petitioner as the tax due from your petitioner on its said capital stock and surplus under said purported Acts of the Twenty-ninth Legislature of the State of Texas.

"4. Your petitioner alleges that it is a corporation engaged in business at Richmond, Indiana, in the manufacture and sale of threshing machinery, portable traction engines, saw mills, and clover hullers, and that its office and principal place of business is located in Richmond, in the County of Wayne, in the State of Indiana, and that it only transacts an interstate business in the State of Texas in the sale of its manufactured products. That it employs at Dallas and Houston, Texas, agents who solicit and superintend the soliciting of orders for the goods manufactured by it at Richmond, Indiana, which orders are taken by such agents or persons, subject to the approval of your petitioner's officers at Richmond, Indiana, and that this applies to all goods sold by your petitioner in the State of Texas; and your petitioner further alleges that it was at the time its permit was granted to it to do business in the State of Texas, as afore-

said, and that it now is and has been ever since said permit was granted to it engaged in an interstate commerce business protected by paragraph three, section eight of article one of the Constitution of the United States.

“5. Your petitioner further alleges that the Acts of March 1, 1905, and of April 11, 1905, of the Twenty-ninth Legislature of the State of Texas, said Acts being chapters 19 and 72 of the General Laws of the State of Texas of 1905, are and each of them is unconstitutional and void, because said purported Acts attempt to impose unjust and illegal burdens and taxes upon foreign corporations, which have obtained a permit to do business in the State of Texas, and because said purported Acts make an unjust and unreasonable discrimination between domestic and foreign corporations in the amount of taxes levied and assessed against said respective kinds of corporations. That said acts and each of them are illegal and void in that they attempt to impose a tax on property not within the State and on property in which the State has no control, and penalties upon officers of corporations not within the State. That said Acts are and each of them is in contravention of article 8, section 1, of the Constitution of the State of Texas, which provides, among other things, that all taxes shall be equal and uniform. That said Acts are and each of them is in violation of article 8, section 2, of the Constitution of the State of Texas, which provides, among other things, that all occupation taxes shall be equal and uniform on the same class of subjects; that said Acts make an unjust and unreasonable dis-

crimination between domestic and foreign corporations and place a heavier burden upon foreign corporation organized for the same kind of business as domestic corporations notwithstanding such foreign corporation is not engaged in business within the State of Texas; that said Acts of March 1, 1905, of the Twenty-ninth Legislature of the State of Texas, said Act being chapter 19 of the General Laws of the State of Texas of 1905, is in violation of section 35, article 3, of the Constitution of the State of Texas providing that no bill except the appropriation bills shall embrace more than one subject and which shall be expressed in its title, and that said Act of April 11, 1905, of the Twenty-ninth Legislature of the State of Texas, being chapter 72 of the General Laws of 1905, is also in violation of section 35, article 3, of the Constitution of the State of Texas; that said Acts of the Twenty-ninth Legislature of 1905 known as chapters 19 and 72, are and each of them is in violation of section 16, article 1, of the Constitution of the State of Texas, providing that the Legislature of the State of Texas shall not pass any law impairing the obligation of contracts. That said Act of March 1, 1905, and known as chapter 19 of the General Laws of 1905 is void and unconstitutional because it attempts to delegate judicial authority to the Secretary of the State to adjudge and declare forfeiture and fix penalties for failure to comply with said Act. That said Acts of the Twenty-ninth Legislature of the State of Texas of March 1, 1905, and April 11, 1905, known as chapters 19 and 72 are and each of them is in violation of paragraph 3, section 8, of the Constitution

of the United States, which provides that Congress shall have power to regulate commerce with foreign nations among the several states and with the Indian tribes in that it attempts to impose a tax upon and discriminate against goods manufactured in a foreign state, which goods are subject to the protection of said paragraph 3, section 8, article 1, of the Constitution of the United States; that said acts are and each of them is in violation of paragraph 1, section 10, article 1, of the Constitution of the United States, which provides, among other things, as follows: that no State shall pass any bill of *attainder ex post facto* law, or law impairing the obligation of contracts; and that such acts are and each of them is in violation of section 1, of the 14th amendment of the Constitution of the United States, which provides, among other things, that no State shall make or enforce any law which shall abridge the privileges or immunities of the citizens of the United States. Nor shall any State deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the law. Wherefore, your petitioner says that both and each of said Acts of the Twenty-ninth Legislature of the State of Texas, is unconstitutional and void and conferred upon the defendant no right, power or authority to demand and receive from plaintiff said sums of money as a tax or otherwise. And your petitioner further alleges that defendant wrongfully and illegally demanded and received said sums of money from your petitioner to its damage in the sum of five hundred and seventy-five dollars (\$575), with

legal interest thereon from the respective dates that he demanded and received said sums of money, as aforesaid.

“6. Your petitioner further alleges that it not only paid said sums of money to the said O. K. Shannon under protest, as heretofore alleged, but that it paid the same to him under duress and for the purpose of preventing him from declaring its permit forfeited, imposing the penalties provided in said Acts of the Twenty-ninth Legislature of the State of Texas and jeopardizing its right to sue and defend in the courts of Texas; and plaintiff further alleges that said sums of money were illegally and wrongfully demanded by the said O. K. Shannon from it, that he was without right, power or authority to demand and receive said sums of money from your petitioner, and that the same were by him illegally and wrongfully taken from your petitioner, and that the same were received by him for an illegal and wrongful purpose, and your petitioner further alleges that by reason of the illegal and wrongful acts of the said O. K. Shannon, as heretofore alleged, he has become and is liable to your petitioner for each of said sums of money paid to him by it, together with legal interest thereon from the respective dates of each of said payments, and that your petitioner has been damaged in the sum of five hundred and seventy-five dollars (\$575), with legal interest thereon as aforesaid, by reason of the said wrongful and illegal acts of the defendant, and though plaintiff has demanded the return of each of said sums of money to it, by the said O. K. Shannon, he has failed and refused to return the

same or any part thereof and still fails and refuses to return the same or any part thereof to plaintiff's damage in the sum of five hundred and seventy-five dollars (\$575), with legal interest thereon.

"Wherefore, premises considered, plaintiff prays that the said O. K. Shannon be cited to answer this petition, and that upon final hearing it have judgment against him for the sum of five hundred and seventy-five dollars (\$575), together with legal interest thereon; said interest to be computed on two hundred and eighty-seven dollars (\$287) of said sum of five hundred and seventy-five dollars (\$575) from the 28th day of April, A. D. 1905, and on two hundred and eighty-eight dollars (\$288) of said sum from the 30th day of April, 1906, together with all costs of court in this behalf incurred; and for such other general and equitable relief as it may be found entitled to either in law or equity."

A general demurrer was filed to this petition (Rec., p. 8) and the demurrer was sustained by the trial court (Rec., p. 9), and the cause dismissed. An appeal was taken to the Court of Civil Appeals for the Third Supreme Judicial District at Austin, State of Texas, and which court affirmed the judgment of the District Court and denied rehearing (Rec., pp. 13-19). Application was then made for writ of error to the Supreme Court of the state (Rec., pp. 23-24), which was denied (Rec., p. 35). Thereupon the writ of error was sued out to this court.

As it appears from the petition, there were certain laws of the State of Texas charged to be in-

valid and the tax sought to be recovered from the Secretary of State, was paid under protest and notice. The Court of Appeals of Texas in deciding the case held that where a state had granted a permit to a corporation under one law, that it had a right to increase the burdens by adding an additional annual franchise tax based upon the whole amount of the capital stock without impairing the obligations of the contract.

The Court of Appeals, holds, as we understand it, the tax is not a property tax. It holds that the tax was voluntarily paid, notwithstanding the protest set out in the petition. The Court of Appeals of the State of Texas further holds that the tax did not discriminate. It further holds there is no allegation in the petition that the Secretary of State still holds the money paid. It does not pass upon the question of taking property without due process of law in violation of the 14th amendment to the Constitution of the United States, but entirely ignores it.

THE ERRORS RELIED UPON ARE AS FOLLOWS (Rec., p. 38):

FIRST.

The Court of Civil Appeals of the State of Texas, having construed the act of the Legislature of the State of Texas, approved March 1, 1905, entitled:

“An Act to amend Articles 5243i and 5243j of an Act entitled ‘An Act to amend Articles 5243i and 5243j, and 5243k of an Act entitled ‘An Act to amend Articles 5243e, 5243i, 5243j and 5243k of Chapter 9, Title 104 of the Revised Civil Statutes relating to the taxation of

insurance, telephone, sleeping and dining car and other corporations, and to provide for forfeiting the charters of domestic corporations and permits of foreign corporations to do business in this state for failure to pay the franchise tax levied by this Act, and to define and prescribe the notice to be given to said corporations previous to said forfeiture, and to provide adequate penalties for a violation of this Act," passed at the present session and approved April 30, 1897,' same being Chapter 120 of the General Laws of the State of Texas, passed at the regular session of the 25th Legislature, in relation to the amounts of the annual franchise tax on domestic and foreign corporations, and the method of computing the same and the enforcement of the payment of such tax."

And said Court of Civil Appeals, having also construed the Act of the Legislature of the State of Texas, approved April 11, 1905, entitled:

"An Act to define the method of computing the annual franchise tax payable by private, domestic and foreign corporations; to repeal all laws and parts of laws in conflict with the provisions of this act; and declaring an emergency."

That said acts are known as chapters 19 and 72 of the General Laws of the 29th Legislature of the State of Texas and are pages 21 and 101 of said General Laws.

That on May 23, 1901, a permit was granted by the State of Texas to plaintiff in error to do business in said State of Texas for a period of ten years from May 23, 1901, as a private foreign corporation, under the provisions of chapter 17 of title 21

of the Revised Civil Statutes of 1895 of the State of Texas, said chapter consisting of articles 745 to 749 of said Revised Statutes of the State of Texas, and expressly authorizing the issuance of said permit to this plaintiff in error for said period of ten years, and this plaintiff in error paid to said State of Texas, for its said permit and the privilege of doing business in the State of Texas, under its said permit the price or fee charged by said State of Texas, said fee being the fee prescribed by article 2439 of the Revised Statutes of the State of Texas of 1895; and that said acts of the 29th Legislature of the State of Texas, as to this plaintiff in error, are repugnant to and violate the provisions of section 10 of article 2 of the Constitution of the United States, providing that no state shall pass any law "impairing the obligation of contracts," it appearing from said acts of the 29th Legislature of the State of Texas that an annual fee for the privilege of doing business in the State of Texas is imposed upon foreign corporations in addition to the fee paid by your petitioner to the State of Texas on May 23, 1901, for such privilege for a term of ten years and for an annual sum greatly larger than said fee so paid by plaintiff in error to the State of Texas on May 23, 1901. And the Court of Civil Appeals of the State of Texas erred in holding that said acts of the 29th Legislature of the State of Texas were not in violation of said provision of the Constitution of the United States, forbidding any state to pass any law "impairing the obligation of contracts."

## SECOND.

It appearing from the record herein and from said acts of the 29th Legislature of the State of Texas that foreign corporations engaged in business in the State of Texas are required and compelled by said acts of the 29th Legislature of the State of Texas, the same being chapters 19 and 72 of the General Laws of said 29th Legislature, to pay to the State of Texas an annual franchise tax not only upon their capital stock as a basis for such tax, but also upon the surplus and undivided profits of each year from whatever source derived, the said Court of Civil Appeals erred in holding that said act of the 29th Legislature of the State of Texas, was valid and not contrary to, and in violation of section 8 of article 1 of the Constitution of the United States conferring upon Congress the power to regulate commerce with foreign nations and among the several states and with the Indian tribes.

## THIRD.

The Court of Civil Appeals of the State of Texas erred in holding that said acts of the 29th Legislature of the State of Texas, known as chapters 19 and 72 of the General Laws of said 29th Legislature, were not in violation of paragraph 3, section 8 of the first article of the Constitution of the United States, conferring upon Congress the power to regulate commerce among the several states, in that it appears from said acts of the said 29th Legislature of the State of Texas that a discriminating tax is imposed by them against foreign corporations in

favor of domestic corporations upon interstate business done by said foreign corporations.

#### FOURTH.

The said Court of Civil Appeals of the State of Texas erred in holding that said Acts of the 29th Legislature of the State of Texas, known as chapters 19 and 72 of the said 29th Legislature, were not in violation of section 1 of the 14th amendment to the Constitution of the United States, which provides that no state shall deprive any person of life, liberty or property without due process of law, in that it appears from said acts of the said 29th Legislature that the Secretary of the State of Texas is empowered to adjudge and declare forfeitures of permits of foreign corporations without judicial intervention and ascertainment, and to thereby deprive foreign corporations of property and rights without due process of law.

#### LAWS QUESTIONED.

At the time the complainant took out a permit to do business in 1901, the laws of the State of Texas requiring foreign corporations to comply with the laws of the state, were as follows:

#### “CHAPTER 119—LAWS OF 1897.

Article 745. Hereafter, any corporation for pecuniary profit except as hereinafter provided, organized or created under the laws of any other state or of any territory of the United States, or of any municipality of such State or Territory, or of any foreign government, sovereignty or municipality, desiring to trans-

act business in this State, or solicit business in this State, or establish a general or special office in this State, shall be and the same is hereby required to file with the secretary of state a duly certified copy of its articles of incorporation, and thereupon the secretary of state shall issue to such corporation a permit to transact business in this State. If such corporation is created for more than one purpose, the permit may be limited to one or more purposes and such corporation on obtaining such permit shall have and enjoy all the rights and privileges conferred by the laws of this State on corporations organized under the laws of this State, and shall be authorized and empowered to hold, purchase, sell, mortgage or otherwise convey such real estate and personal estate as the purposes of such corporation may require, and also, to take, hold and convey such other property, real, personal or mixed, as may be requisite for such corporation to acquire in order to obtain or secure the payment of any indebtedness or liability due, or which may become due, or belonging to the corporation; provided that if such corporation so obtaining a permit to do business in this State, shall acquire any real estate under the powers hereby conferred, it shall alienate all real property so acquired by it not necessary for the purposes of such corporation, within fifteen years from the time of acquisition; and provided, further, that such corporation shall alienate all real estate acquired by it for the purposes of such corporation, within fifteen years from the expiration of the time for which the permit is issued, or if such permit be renewed, or such corporation be otherwise authorized to carry on business in this State, then such corporation shall alienate such real estate within fifteen years after the expiration of the time for which such permit is extended, or it is so authorized to carry on business in this State; and provided further that if such corpo-

ration shall cease to carry on business in this State, that it shall alienate all such real estate so acquired by it, within fifteen years after the time it shall so cease to carry on business in this State.

"Art. 746. No such corporation can maintain any suit or action either legal or equitable, in any of the courts of this State upon any demand, whether arising out of contract or tort unless at the time such contract was made or tort committed the corporation had filed its articles of incorporation under the provisions of this chapter in the office of the Secretary of State for the purpose of procuring its permit.

"Art. 747. The provisions of this chapter shall not apply to corporations created for the purpose of constructing, building, operating or maintaining any railway, or to such corporations as are required by law to procure permits to do business from the commissioner of agriculture, insurance, statistics or history.

"Art. 748. No permit shall be issued for a longer period than ten years from the date of filing such articles of incorporation in the office of the Secretary of State.

"Art. 749. Either the original permit or certified copies thereof by the Secretary of State shall be evidence of the compliance on the part of any corporation with the terms of this chapter. A certificate of the Secretary of State to the effect that the corporation named therein has failed to file in his office its articles of incorporation shall be evidence that such corporation has in no particular complied with the requirements of this chapter."

Also chapter 120 of the Laws of 1897, as to the payment of fees, in force in 1901, which is as follows:

"Section 1. *Be it enacted by the Legislature of the State of Texas:* That articles 5243i,

5243j and 5243k, of an act entitled 'An Act to amend articles 5243e, 5243i, 5243j and 5243k, of chapter 9, title 104, of the Revised Civil Statutes relating to the taxation of insurance, telephone, sleeping and dining car and other corporations, and to provide for forfeiting the charters of domestic corporations, and permits of foreign corporations to do business in this State for failure to pay the franchise tax levied by this act, and to define and describe the notice to be given to said corporations previous to such forfeiture, and to provide adequate penalties for a violation of this act,' passed at the present session and approved April 30, 1897, be and the same is hereby amended so as hereafter to read as follows:

"Article 5243i. Each and every private domestic corporation heretofore chartered under the laws of this State shall pay to the Secretary of State an annual franchise tax of ten dollars on or before the first day of May of each year; and every such corporation which shall be hereafter chartered under the laws of this State shall also pay to the Secretary of State an annual franchise tax of ten dollars, the tax for the first year to be paid at the time such charter is filed, and the Secretary of State shall not be required or permitted to file such charter until such tax is paid, and each succeeding tax shall be paid on or before the first day of May of each year thereafter; provided, that any such corporation having an authorized capital stock of over fifty thousand dollars and less than a hundred thousand dollars, shall pay an annual franchise tax of twenty dollars; and every such corporation having an authorized capital stock of one hundred thousand dollars and less than two hundred thousand dollars, shall pay an annual franchise tax of thirty dollars; and every such corporation having an authorized capital stock of two hundred thousand dollars

or more shall pay an annual franchise tax of fifty dollars.

“Each and every foreign corporation heretofore authorized to business in this State under the laws of this State shall, on or before the first day of May of each year, and each and every such corporation which shall hereafter be so authorized to do business in this State, shall, at the time so authorized, and on or before the first day of May of each year thereafter, pay to the Secretary of State the following franchise tax: Every such corporation having an authorized capital stock of twenty-five thousand dollars or less, an annual franchise tax of twenty-five dollars; every such corporation having an authorized capital stock of more than twenty-five thousand dollars and not exceeding one hundred thousand dollars an annual franchise tax of one hundred dollars; every such corporation having an authorized capital stock of over one hundred thousand dollars, an annual franchise tax of one hundred dollars and in addition thereto an annual franchise tax of one dollar for every ten thousand dollars of authorized capital stock over and above one hundred thousand dollars and not exceeding one million dollars; and if such authorized capital stock exceeds one millions dollars, then such corporation shall pay a still further additional tax of one dollar for every one hundred thousand dollars over and above one million dollars. Any corporation, either domestic or foreign, which shall fail to pay the tax provided for in this article at the time specified herein, shall, because of such failure, forfeit its right to do business in this State, which forfeiture shall be consummated, without judicial ascertainment, by the Secretary of State, entering upon the margin of the ledger kept in his office relating to such corporations, the word ‘Forfeited,’ giving the date of such forfeiture, and

any corporation whose right to do business may be thus forfeited shall be denied the right to sue or defend in any of the courts of this State, and in any suit against such corporation on a cause of action arising before such forfeiture, no affirmative relief may be granted to such defendant corporation, unless its right to do business is revived as provided in Article 5243j of this Act. All transportation companies now paying an annual income tax on their gross receipts in this State shall be exempted from the franchise tax above imposed.

“Article 5243j. The Secretary of State shall on or before the 1st day of March of each year, notify all private, domestic and foreign corporations subject to a franchise tax by any law of this state, by mailing to the postoffice named as the principal place of business of such corporation in its articles of incorporation, or to any other place of business of such corporation, addressed in its corporate name, a written or printed notice that such tax will be due at a date named therein, a record of the date of which mailing must be kept by said officer, and which mailing of such notice and the said record thereof shall constitute legal and sufficient notice for all the purposes of this act; and in thirty days after the 1st day of May of each year, said officer shall publish for ten consecutive days in some daily newspaper published in the state, a list of the corporations whose right to do business in this state has been forfeited for non-compliance with this act; provided, that any corporation which shall within six months after such publication pay the tax and (\$5) five dollars additional thereto, for each month or fractional part of a month which shall elapse after such forfeiture, shall be relieved from the forfeiture of its right to do business by reason of such failure, and when such tax and the said penalty are

fully paid to the Secretary of State it shall be the duty of said officer to revive and reinstate said right to do business by erasing or cancelling the word 'Forfeited' from his ledger, and substituting therefor the word 'Revived' giving the date of such revival; providing further, that this chapter shall not be construed to repeal any law prescribing fees to be collected by the Secretary of State. \* \* \*

"Section 2. The fact that the close of the session is rapidly approaching, and the further fact that the state is greatly in need of revenue, and in order to remove any doubt of the proper construction of the articles hereby amended, creates an emergency, and an imperative public necessity exists that the constitutional rule requiring bills to be read on three several days be suspended, and that this act take effect from and after its passage, and it is so enacted."

Prior to the payment of the taxes which are sought to be recovered, there was no change in sections 745 to 749, but in 1905 there was a change or an amendment which increased the burdens and which is known as chapters 19 and 72 of the laws of 1905, and which are as follows:

#### "CHAPTER 19.

"Section 1. BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF TEXAS: That articles 5243i and 5243j of an Act entitled 'An Act to amend articles 5243i, 5243j and 5243k of an Act entitled "An Act to amend articles 5243e, 5243i, 5243j and 5243k, of chapter 9, title 104, of the Revised Civil Statutes relating to the taxation of insurance, telephone, sleeping and dining car and other corporations, and to provide for forfeiting the charters of domestic corporations and permits of foreign corporations to do busi-

ness in this state, for failure to pay the franchise tax levied by this act, and to define and prescribe the notice to be given to said corporations previous to said forfeiture, and to provide adequate penalties for a violation of this Act," passed at the present session, and approved April 30th, 1897,' said Act being chapter 120 of the General Laws of the State of Texas, passed at the regular session of the 25th Legislature, be amended so as to hereafter read as follows:

"Art. 5243i. Each and every *private, domestic* corporation heretofore chartered, or that may hereafter be chartered, under the laws of this state shall, on or before the first day of May of each year, pay to the Secretary of State the following franchise tax for the year following, to-wit: *One dollar on each two thousand dollars* or fractional part thereof of the authorized capital stock of the corporation up to and including one hundred thousand dollars, and *one dollar on each ten thousand dollars* or fractional part thereof of such stock in excess of one hundred thousand dollars and up to and including one million dollars; and *one dollar on each twenty thousand dollars* or fractional part thereof of such stock in excess of one million dollars, and up to and including ten million dollars; and *one dollar on each fifty thousand dollars* or fractional part thereof of such stock in excess of ten million dollars; but such tax shall not be less than ten dollars in any case. And each and every *foreign corporation* heretofore authorized or that may hereafter be authorized, to do business in this state, shall, on or before the first day of May of each year, pay to the Secretary of State the following franchise tax for the year following, to-wit: *One dollar on each one thousand dollars* or fractional part thereof of the authorized capital stock of the corporation up to and

including one hundred thousand dollars; and *one dollar on each five thousand dollars* or fractional part thereof of such stock in excess of one hundred thousand dollars, and up to and including one million dollars; and *one dollar on each twenty thousand dollars* or fractional part thereof of such stock in excess of one million dollars, and up to and including ten million dollars; and *one dollar on each fifty thousand dollars* of such stock in excess of ten million dollars; but such tax shall not be less than twenty-five dollars in any case. Whenever a corporation is chartered or authorized to do business in this state, it shall pay the proportional part of such annual franchise tax corresponding to the length of time before the next following first day of May, and if such tax be not then paid, no such charter shall be filed or permit issued. The franchise tax herein provided for *shall be computed upon the basis of the total amount of the capital stock issued and outstanding, plus the surplus and undivided profits of the corporations, instead of upon the authorized capital stock*, whenever such total amount is different from the authorized capital stock. Affidavit of the head of the corporation and secretary thereof to these facts may be filed with the Secretary of State, or may be required whenever in his judgment the same is necessary to protect the interests of the state. Any corporation either domestic or foreign, which shall fail to pay the tax provided for in this article at the time specified herein shall immediately become liable to a penalty of twenty-five per cent on the amount of the tax due by it, and if the amount of said tax and penalty be not paid in full on or before the first day of July thereafter, such corporation shall, for such default, forfeit its right to do business in the state, which forfeiture shall be consummated without judicial ascertainment,

by the Secretary of State entering upon the margin of the ledger kept in his office relating to such corporation the word 'Forfeited,' giving the date of such forfeiture; and any corporation whose right to do business may be thus forfeited shall be denied the right to sue or defend in any of the courts of this state, and in any suit against such corporation on a cause of action arising before such forfeiture, no affirmative relief may be granted to such corporation unless its right to do business is revived, as provided in article 5243j. All insurance, surety, guaranty and fidelity companies, all transportation companies, and all sleeping, palace and dining car companies now paying an annual income tax on their gross receipts in this state shall be exempted from the franchise tax above imposed.

"Art. 5243j. The Secretary of the State shall, during the month of May of each year, notify each private, domestic and foreign corporation subject to a franchise tax under any law of this state, which has failed to pay such tax on or before the first day of May, that unless such defaulted tax, together with the penalty thereon, be paid on or before the first day of July following, its right to do business in the state will be forfeited without judicial ascertainment. Such notice may be either written or printed, and shall be mailed to the post-office named in its articles of incorporation as the principal place of business of such corporation or to any other known place of business of such corporation, addressed in its corporate name, and a record of the date of mailing shall be kept by the Secretary of State. Such notice and the said record thereof shall constitute legal and sufficient notice for all the purposes of this act. Any corporation whose right to do business may have been thus forfeited shall be relieved from such forfeiture by

paying to the Secretary of State, at any time within six months after its forfeiture, the full amount of the franchise tax and penalty due by it, together with an additional amount of five per cent of such tax (in no case to be less than five dollars), for each month or fractional part of a month which shall elapse after such forfeiture. When such tax and all such penalties are fully paid to the Secretary of State, he shall revive and reinstate the right of the corporation to do business, by canceling the word 'Forfeited' from his ledger, and substituting therefor the word 'Revived,' giving the date of such revival. But nothing in this act shall be construed to repeal any law prescribing fees to be collected by the Secretary of State, provided the provisions of this act shall not apply to corporations having no capital stock organized for the exclusive purpose of promoting the public interest of any city or town.

"Sec. 2. The near approach of the time (March 1) on or before which, by existing law, notices of the franchise tax must be sent out and the growing deficit in the state treasury, create an imperative public necessity for the suspension of the constitutional rule requiring bills to be read on three several days, and an emergency demanding that this act take effect and be in force from and after its passage; and it is so enacted.

#### "CHAPTER 72—LAWS 1905.

"Section 1. *Be it enacted by the Legislature of the State of Texas:* That the annual franchise tax payable to the state by private domestic corporations heretofore chartered or that may hereafter be chartered under the laws of this state, and foreign corporations heretofore authorized or that may hereafter be authorized to do business in this state, shall be computed

upon the basis of the authorized capital stock of the corporation, as stated in its articles of incorporation, or certified copy thereof, unless the aggregate amount of the capital stock issued, plus the surplus and undivided profits of the corporation exceeds the authorized capital stock, in which case the franchise tax shall be computed upon the basis of such aggregate amount. For the purpose of making such computations, the Secretary of State is authorized to require affidavits of the president, secretary, treasurer and other officers of any such corporation to show the amount of its capital stock issued and its surplus and undivided profits, whenever in his judgment the same may be necessary, or he may ascertain such facts from other sources. Should an officer of any corporation, subject to the payment of an annual franchise tax, fail or refuse to give under oath full and accurate information of the amount of the capital stock issued by the corporation, or of the amount of its surplus or undivided profits, when required so to do by the Secretary of State, he shall be deemed guilty of misdemeanor, and upon conviction shall be fined in any sum not more than five hundred dollars.

"Sec. 2. That all laws and parts of laws in conflict with the provision of this act, be and the same are hereby repealed, in so far as they conflict herewith.

"Sec. 3. The near approach of the time (May first) on or before which the franchise tax due and payable by corporation must be paid, and the growing deficit in the state treasury, create an imperative public necessity for the suspension of the constitutional rule requiring bills to be read on three several days, and an emergency demanding that this act take effect and be in force from and after its passage; and it is so enacted."

It is these laws which are involved in this case.

## A R G U M E N T .

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### FIRST.

CHAPTERS 19 AND 72 OF THE LAWS OF THE 29TH LEGISLATURE OF THE STATE OF TEXAS IMPAIR THE OBLIGATION OF CONTRACTS ENTERED INTO BETWEEN THE STATE OF TEXAS AND THE PLAINTIFF IN ERROR ON THE 23RD DAY OF MAY, 1901, BY WHICH THE PLAINTIFF WAS GRANTED A PERMIT TO DO BUSINESS IN THE STATE, FOR A PERIOD OF TEN YEARS.

Article 1, Section 16 of the Constitution of the State of Texas provides:

“No bill of attainder, *ex post facto* law, retroactive law, or any law impairing the obligation of contracts, shall be made.”

This provision of the Constituion is merely a reiteration and declaratory of paragraph 1, section 10, article 1 of the Constitution of the United States, which is as follows:

“No state shall enter into any treaty, alliance or confederation; grant letters of marque and reprisal; coin money; emit bills of credit; make anything but gold and silver coin a tender in payment of debts; pass any bill of attainder, *ex post facto* law, or law impairing the obligation of contracts, or grant any title of nobility.”

The Constitution of the State of Texas is silent as to the rights of foreign corporations.

Article 12 of the Constitution of the State of Texas contains the provision regarding the crea-

tion of corporations and the limitations that are imposed thereon.

Referring to sections 745 to 749 inclusive, of laws of 1901, which apply solely to foreign corporations, we do not find that the Legislature has reserved any power to alter, amend, burden, or in any way embarrass the permit granted to a foreign corporation.

Section 748 of the Revised Statutes of Texas which was in force in 1901 at the time the permit was granted, provides:

*“No permit shall be issued for a longer period than ten years from the date of filing such articles of incorporation in the office of the Secretary of State.”*

Reading these Sections 745 to 748 in force in 1901, together, it is very clear that they created a contract between the state and the foreign corporation by which the state grants the foreign corporation a permit good for ten years, subject however to the fact that the corporation shall pay to the state a certain sum of money.

In the laws of 1895, section 2439, as applied to foreign corporations, this being the law in force in 1901, the statute provides:

*“Each foreign corporation shall pay fees as follows: If its capital stock is \$100,000 or less, a fee of \$25 to procure a permit; if its capital be more than \$100,000 and less than \$500,000 it shall pay a fee of \$50; if its capital stock shall be more than \$500,000 and less than \$1,000,000, it shall pay a fee of \$100; if its capital stock exceed \$1,000,000 it shall pay a fee of \$200. All fees mentioned in this article shall be paid*

in advance into the office of the Secretary of State, and shall be by him paid into the treasury monthly."

The fees provided for in that section are the fees imposed by the Legislature of the state to be paid to the Secretary of State merely for the issuing of a permit and are in addition to the annual franchise tax.

The laws of 1895, sections 5243i and j, provide as follows:

"5243i. Each and every private domestic corporation heretofore chartered or that may be hereafter chartered under the laws of this state, and each and every foreign corporation that has received or may receive a permit to do business under the laws of this state, shall pay to the Secretary of State annually, on or before the first day of May, a franchise tax of \$10. Any such corporation which shall fail to pay the tax provided for in this article, shall, because of such failure, forfeit their charter."

"5243j. The Secretary of State shall, on or before the first day of March in each year, notify all corporations subject to the tax provided in the preceding article, and in 30 days after the first day of May of each year, shall publish a list of the charters forfeited for non-compliance with this chapter, provided that any corporation which shall within 60 days after such publication pay the taxes and \$5 additional thereto shall be relieved from forfeiture of its charter by reason of such failure; provided, further, that this chapter shall not be construed to repeal any law prescribing fees to be collected by the Secretary of State."

These were amended by the laws of 1897, chapter 120 as hereinbefore set forth which materially increased the tax.

It will be noted by the law of 1897 in force in 1901 at the time plaintiff in error took out their permit, (under sections "i" and "j") that a failure to pay the tax annually should work a forfeiture and the Secretary of State should mark the word "Forfeited" upon his book. Further it will be noticed that the Secretary of State should on or about the first day of March in each year, notify all private, domestic and foreign corporations subject to the franchise tax, etc, to make the report and pay the tax.

Chapter 19 of the laws of 1905 increases the amount of taxes on foreign corporations; for instance, the law in force in 1901 provides as follows:

Corporations having a capital stock of \$25,000 or less, \$25; from \$25,000 to \$100,000, \$100; over \$100,000, shall pay \$100 and \$1 on each additional \$10,000 up to \$1,000,000, and in excess of \$1,000,000, \$1 on each \$100,000 of such excess.

The laws of 1905 provides for \$1 on each \$1,000 up to \$100,000, and \$1 on each \$5,000 in excess of \$100,000 up to and including \$1,000,000; \$1 on each \$20,000 in excess of \$1,000,000, up to \$10,000,000; \$1 on each \$50,000 in excess of \$10,000,000, but no tax to be less than \$25.

And the law of 1905 further provides the franchise tax herein provided for shall be computed upon the basis of the total amount of the capital

stock issued and outstanding, plus the surplus and undivided profits of the corporations, instead of upon the authorized capital stock, whenever such total amount is different from the authorized capital stock.

Both acts make provision for the forfeiture and make provision that:

“Any corporation whose right to do business may be thus forfeited, shall be denied the right to sue or defend in any of the courts of this state, and in any suit against such corporation on a cause of action arising before such forfeiture.”

The laws of 1905 did not require notice to be given to corporations prior to adding of the penalty, but the notice which was required in section 5243j of the law as it stood in 1897, to be given on or before the first day of March, was changed so that it should not be given until after the first day of May, and after the penalty was added for failure on the part of a corporation who had a permit to pay the annual franchise tax on or before the first day of May. In other words, the law of 1905 made it obligatory upon the corporation who had a permit under the laws of 1897 and which were in force in 1901, to make its report and pay the taxes prior to the first day of May without any notice, and if it did not do it then under the law of 1905, a 25% penalty was added without judicial ascertainment. See section 5243i; and then after the first day of May the Secretary of State was to give notice of the failure to pay the tax ascertained by him and

the added penalty, and if the tax and penalty was not paid before the first day of July, a forfeiture should be declared without judicial ascertainment.

This law of 1905 is the law complained of and is the law which we say impairs the obligation of contracts and violates Section 10, Article I of the Constitution of the United States. Upon this point we cite *American Smelting & Refining Co. v. Colorado*, 204 U. S. 103. In that case it appears that suit was brought by the State of Colorado to forfeit the franchise of the American Smelting & Refining Co. for failure to pay a franchise tax imposed by the laws of Colorado. The trial court found the refining company was indebted to the state for franchise tax in the amount of \$4,000; that the statute was valid, and that the company should be deprived of all rights and privileges within the state until the tax was paid. The Supreme Court of Colorado affirmed the decision. This court reversed the decision of the Supreme Court of Colorado, holding, as we understand it, that the State of Colorado at the time of issuing the permit entered into a contract with the corporation, which the state could not impair by subsequent acts creating greater burdens and impose different obligations upon it than it imposed at the time it entered into the state.

It seems that the American Smelting & Refining Company was incorporated on April 4, 1899, under the laws of New Jersey; on April 28, 1899, it made application to do business in the State of Colorado. At that time its capital was \$65,000,000. Subsequently, on April 8, 1901, it was increased to \$100,-

000,000, and a certificate of such increase was filed. The law of Colorado at the time it made the application, provided that every foreign corporation doing business in that state should file with the Secretary of State a copy of its charter; that it should pay the Secretary of State \$10 if the capital stock did not exceed \$50,000, if in excess of that sum it should pay a further sum of 15 cents on every thousand dollars of such excess, and 15 cents on each one thousand dollars of the amount of each subsequent increase in stock. These fees were to be paid upon the filing of the certificate of incorporation. When it filed its certificate in 1899 it paid to the state \$9,792.50, and when it increased its capital in 1901 it paid the further sum of \$5,250, and the Secretary of State issued to it a certificate in pursuance of the law. There was not, in May, 1901, any provision for any other fees or taxes for the purpose of going in and doing business in the state.

In 1899 it began to erect a plant and invested over \$5,000,000 there. At that time the life of corporations organized under the laws of that state, was 20 years. In 1902 the Legislature of Colorado passed an act providing that domestic corporations should pay an annual license tax of two per cent on each \$1,000 of capital stock, and that foreign corporations, which had theretofore obtained the right and privilege to transact and carry on business within the limits of the state, should in addition to the fees and taxes now provided by law, and as a condition precedent to its right to do any business within the limits of the state, pay annually a

state license tax of four cents upon each \$1,000 of its capital.

The statute further provided that every corporation which should fail to pay the tax should forfeit its right to do business within the state until the tax was paid, and it should be deprived of all rights and privileges, and the fact of such failure might be pleaded as an absolute defense to any and all actions of suit or proceedings in law or in equity brought or maintained by or in behalf of such corporation, in any court of competent jurisdiction, within the state, until the tax was paid. The corporation refused to pay the tax, and the Attorney-General commenced the suit.

In the case of *Cumberland Telephone & Telegraph Co. v. Hopkins*, 90 S. W. Rep. 594 (Kentucky), suit was brought by several telegraph, telephone and railroad companies against the police judge of the City of Eminence and others to prohibit the enforcement of an occupation tax. The lower court dismissed the petition and an appeal was taken to the Supreme Court of Kentucky. In the course of the opinion, page 596, the court say:

“The mere right to be a corporation is taxed, in the exacting of the organization tax upon its creation. This is collected once, and absolutely without reference to its property or whether it ever engages in the business contemplated by its articles.”

Again, on page 597:

“The court is of opinion that, after having sold the telephone company the privilege of putting up and operating its line and conduct-

ing its business in the town, the municipality cannot afterwards, without the consent of the telephone company, impose an additional charge for the identical privilege. This franchise sold by the city to appellant telephone company was the creature of the city. It was not only to occupy its streets, the consideration being compensation for right of way, but it was for operating its exchange in the city and receiving tolls thereat upon its business. It was that or nothing. The city could not impart to the telephone company any corporate quality. That it already had, or must get from the state. The ordinance selling the franchise by its terms went further than to grant the right to occupy the city streets and alleys. It expressly dealt with, and sold for a consideration, the privilege of doing identical business within the city that it is doing."

In connection with this, see also the *Virginia Coupon* cases, 114 U. S. 270, above referred to.

If, as is held in the case of the *American Smelting & Refining Co. v. Colorado*, *supra*, the permit amounted to a contract, much more does it amount to a contract in this case. Therefore, we insist that upon this point alone this case must be reversed.

In conclusion upon this point it seems clear that the laws of 1905 violated the contract entered into between Gaar, Scott & Co. and the State of Texas in 1901 and took away certain privileges granted and imposed additional burdens under that contract, the law of 1905 clearly imposes a new obligation under that contract, and the trial court and Court of Civil Appeals should have so held and for failure so to do this cause should be reversed and remanded.

## SECOND.

THE SECOND ASSIGNMENT OF ERRORS, CLAIMING THAT CHAPTER 19 AND 72 OF THE LAWS OF 1905, BEING THE 29TH LEGISLATURE, ARE VOID IN THAT THEY REQUIRE FOREIGN CORPORATIONS ENGAGED IN INTERSTATE COMMERCE TO PAY TO THE STATE OF TEXAS AN ANNUAL FRANCHISE TAX, NOT ONLY UPON THEIR CAPITAL STOCK AS A BASIS FOR SUCH TAX, BUT ALSO UPON THE SURPLUS AND UNDIVIDED PROFITS OF EACH YEAR FROM WHATEVER SOURCE DERIVED, THE COURT OF APPEALS OF TEXAS ERRED IN NOT HOLDING SUCH WAS A TAX UPON INTERSTATE COMMERCE AND VOID.

The fourth paragraph of the petition alleges :

“Your petitioner alleges that it is a corporation engaged in business at Richmond, Indiana, in the manufacture and sale of threshing machinery, portable traction engines, saw mills and clover hullers, and that its office and principal place of business is located in Richmond, in the County of Wayne in the State of Indiana, and that it only transacts an interstate business in the State of Texas in the sale of its manufactured products. That it employs at Dallas and Houston, Texas, agents who solicit and superintend the soliciting of orders for the goods manufactured by it at Richmond, Indiana, which orders are taken by such agents or persons, subject to the approval of your petitioner's officers at Richmond, Indiana, and that this applies to all goods sold by your petitioner in the State of Texas; and your petitioner further alleges that it was at the time its permit was granted to it to do business in the State of Texas, as aforesaid, and that it is now and has been ever since said permit was

granted to it, engaged in an interstate commerce business protected by paragraph three, section eight of article one of the Constitution of the United States."

In discussing this question, we must bear in mind that defendants in error have filed a general demurrer to the bill. That allegation is an allegation of fact, and therefore is admitted by the demurrer.

As has been said by this court in *Pullman Palace Car Company v. Missouri Pacific Co.*, 115 U. S. 587, 596:

"A demurrer admits all facts stated in the bill which are well pleaded, but not necessarily all statements of conclusions of law."

If there is any conclusion of law in that paragraph, of course the demurrer does not admit it, but the paragraph states facts showing that the transactions of plaintiff in error, so far as the sale of its goods in Texas is concerned, is purely interstate commerce business.

In the case of *Angle v. Chicago, St. Paul, etc., Railway Company*, 151 U. S. 1, on page 10, it is said:

"The truth of all the allegations in which must be taken, upon this record, to be admitted by the demurrer."

And such is the rule in Texas—that the allegations of fact, well pleaded, are admitted by the demurrer to be true as pleaded, but of course deny that they state a cause of action.

*Leslie v. Harris*, 1 White & W. Civil Cases,  
Court of Appeals, Sec. 71.

*Heil v. Martin*, 70 S. W. Rep. 434.

*Brown v. City of Houston*, 48 S. W. Rep.  
760.

*Junction City v. Trustees*, 81 Texas, 151.

*Wolf v. Butler*, 81 Texas, 92.

Therefore, the demurrer admitting the 4th paragraph of the bill, and admitting the payment of the tax as alleged in the second and fifth paragraphs of the bill, it is insisted that the tax is a tax upon interstate commerce and therefore the laws in question violate paragraph 3, section 8, article 1 of the Constitution of the United States.

Therefore it becomes necessary to determine what is interstate commerce as distinguished from commerce within the state.

1. That the soliciting of orders by the agent of a foreign corporation in another state is not doing business in the foreign state.

2. The keeping of an office or an agent in a foreign state for the purpose of soliciting orders is not doing business in the foreign state.

3. The soliciting of orders by traveling salesmen is not doing business in a foreign state.

4. The sale of goods in a foreign state in bulk or in original packages by the consignee or manufacturer cannot be denied by a foreign state to a corporation or individual. When such goods are not injurious to good health or public morals.

5. The mere sale of goods in a foreign state by a manufacturing company not doing business in such foreign state.

We shall now proceed to demonstrate the foregoing statements.

1. The soliciting of orders by the agent of a foreign corporation in another state is not doing business in the foreign state.

Commencing with *Dozier v. Alabama*, 218 U. S. 124, where it is held that an agent of a foreign corporation soliciting orders for pictures to be enlarged, and also orders for frames to be delivered with the enlarged pictures, and who sends the order to the home office in a foreign state where the work is done and the picture and frame are returned to the agent, who delivers them to the purchaser and collects therefor at an agreed price, was protected by the commerce clause of the federal constitution, and that the state or city or municipality could not lay any burden by way of tax or any refusal to permit the soliciting and taking of such orders, and that any law or ordinance imposed which affected such commerce, was void.

To the same effect is the case of *Caldwell v. Carolina*, 187 U. S. 622, where it was held that an ordinance of the city which required solicitors to take out a license or be subject to a penalty, the solicitor failed to take out a license and solicited the orders, sending them to the home office for execution, from which they were returned to him, he putting the pictures in the frames and delivered them

and collected for the same, and he was held not to be liable.

In the case of *Rearick v. Pennsylvania*, 203 U. S. 507, an instance where an agent of a corporation engaged in the grocery business at Columbus, Ohio, went into the State of Pennsylvania, and solicited orders which orders were sent by him to the corporation and the goods were put up in packages and he delivered them to the purchaser who paid for them, and he was held not liable under the law and ordinance as a solicitor.

To the same effect is *Menke v. State*, 97 N. W. Rep. 1020 (Nebraska).

*In re Kinyon*, 75 Pac. Rep. 268 (Idaho), was a case where the Wrought Iron Range Company, a corporation of Missouri, sent solicitors into the State of Idaho to sell ranges which were shipped by them and delivered and the purchaser settled for the same, and it was held that a license tax imposed upon such solicitors was an interference with interstate commerce.

To the same effect is *Wrought Iron Range Company v. Campen*, 47 S. E. Rep. 658 (North Carolina). In this case it appears that the Wrought Iron Range Company sent into the State of North Carolina, goods in car lots. That it there had its agents, a division superintendent who had charge of the business; employed men who solicited orders; employed men who delivered its goods; owned its own teams. If the orders were satisfactory to the superintendent, the goods were delivered. It was there held to be doing an interstate commerce business

and not required to comply with foreign corporation laws of the state or to pay the occupation tax required by the state.

To the same effect is the case of *Rock Island Plow Co. v. Peterson*, 101 N. W. Rep. 616 (Minn.); *De Witt v. Berger Mfg. Co.*, 81 S. W. Rep. 334 (Texas); *Bateman v. Western Star Milling Co.*, 20 S. W. Rep. 931 (Texas); *Gunn v. White Sewing Machine Co.*, 20 S. W. Rep. 591 (Ark.); *Stratford v. City Council*, 20 So. Rep. 127 (Ala.).

In the latter case an attempt was made to collect from a broker, a brokerage license tax; it appeared that the broker resided in the City of Montgomery and the city had passed an ordinance which was known as the "general brokerage tax" and applied to all persons acting as brokers. Exemption was claimed by reason of representing foreign manufactured goods for which orders were taken and sent to the home office and occasionally the goods were sent to the broker in bulk and he billed them out, and it was held the act did not apply. This case was approved by the United States Supreme Court in the case of *Stockard v. Morgan*, 185 U. S. 27, where almost a similar condition of affairs existed, but applied particularly to the laws of Tennessee.

In these various cases referred to above, the court reviews many cases of earlier date, the principal one being *Robbins v. Shelby County Taxing District*, 120 U. S. 489.

The case of *Norfolk & Western Railway Co. v. Sims*, 191 U. S. 441, was another case, where Sears,

Roebuck & Co. of Chicago, sent their agents into North Carolina to solicit orders for sewing machines. In that case they had a special law requiring agents who solicited orders for sewing machines, to pay a tax, for the purpose of so doing. One of the machines was levied upon and suit was brought to recover it back on the ground that the transaction was interstate commerce and protected from taxation or any discriminating tax, and this court upheld this view.

The case of *McCall v. California*, 136 U. S. 104, involved the question of a license tax imposed by the City of San Francisco upon agencies. In that case the person sought to be convicted was the agent of the New York, Lake Erie and Western Railroad Company, who had not complied with the ordinance and had not taken out a license. He was convicted in the courts of the state. It appeared that the corporation was engaged in business between Chicago and New York, operating a line of railroad. The agent's duties consisted of soliciting passenger traffic in that city and county over the road he represented. He did not sell the tickets to such passengers over that road or any other, but took them to the Central Passenger Railroad Company where the tickets were sold to them. The only duty he was required to perform was to induce people contemplating making a trip east to be booked over the line he represented. He neither received nor paid out any money or other valuable considerations. In the opinion after the court had discussed a number of cases, this court said:

“But upon an examination of the cases in which they were rendered it will be found that the legislation adjudged invalid, imposed a tax upon some instrument or subject of commerce, or exacted license fees from parties engaged in commercial pursuits, or created an impediment to the free navigation of some public waters, or prescribed conditions in accordance with which commerce in particular articles or between particular places was required to be conducted. In all the cases the legislation condemned operated directly upon commerce, either by way of tax upon its business, license upon its pursuit in particular channels or conditions for carrying it on.”

In the case of *McNeil v. Southern Railway Company*, 202 U. S. 558, the question was whether the State Railway Commission could compel a company to deliver cars on private sidings where the shipment was one of interstate commerce, and it was held that such commission could not compel the railroad company doing business in the state to deliver the carload of goods, which were the subject of interstate traffic, at a particular point or upon a private siding as it was an interference with interstate commerce.

SOLICITING FOR THE SALE OF GOODS BY A TRAVELING SALESMAN IS NOT DOING BUSINESS IN A FOREIGN STATE, AND IS PROTECTED BY THE COMMERCE CLAUSE OF THE FEDERAL CONSTITUTION.

The authorities cited under the last heading fully sustain this proposition. Such was the holding in the case of *Rearick v. Pennsylvania*, *Dozier v. Alabama*, *supra*, *Stockard v. Morgan*, *supra*, *Caldwell*

*v. North Carolina, supra, Norfolk & Western Railway Co. v. Sims*, 191 U. S. 441, *Stratford v. City of Montgomery*, 20 So. Rep. 127. Such has been the holding of the court of Many of the states of this country.

*In re ex parte Massey*, 92 S. W. Rep. 1082 (Texas), Massey was arrested for soliciting orders for the sale of liquors in a prohibition district, and it was held the statute was unconstitutional and in violation of article 16, section 20, of the Constitution of the State of Texas, authorizing the Legislature to prohibit the sale of liquor within prescribed limits, as the solicitation of an order was not a sale and is in conflict with the commerce clause of the federal constitution.

In *French, Finch & Co. v. Hicks*, 92 S. W. Rep. 1034 (Texas), the court held that a foreign corporation does not have to comply with the laws of the state in order to maintain a suit for the sale of goods which are the subject of interstate commerce, the corporation not being required to obtain a permit.

To the same effect is the case of *King v. Monitor Drill Co.*, 92 S. W. Rep. 1046; see also *De Witt v. Berger*, 81 S. W. Rep. 334.

Referring again to the cases in this court in *Leloup v. Port of Mobile*, 127 U. S. 640, which was an action brought by the Port of Mobile against Leloup, who was the agent of the Western Union Telegraph Company, to recover a penalty imposed upon him for violating an ordinance which required the company to pay a tax of \$225, and also a fine of \$5 for

failure to comply, this court reversed the judgment of the state court, and in the course of the opinion, the court quotes the following:

“We will not gainsay that this license tax was imposed as a revenue measure—as a means of taxing the business, and thus compelling it to aid in supporting the city government. That no revenue for state or municipal purposes can be derived from the agencies or instrumentalities of commerce, no one will contend. The question generally mooted is, how shall this end be attained? In the light of the many adjudications on the subject, the ablest jurists will admit that the line which separates the power from its abuse is sometimes very difficult to trace. No possible good could come of any attempt to collate, explain and harmonize them. We will not attempt it. We confess ourselves unable to draw a distinction between this case and the principle involved in *Osborne v. Mobile*, 16 Wall. 479. In that case the license levy was upheld, and we think it should be in this.”

The foregoing quotation was taken from the opinion of the Supreme Court of Alabama.

This court said:

“In approaching the question thus presented, it is proper to note that the license tax in question is purely a tax on the privilege of doing business in which the telegraph company was engaged. By the laws of Alabama in force at the time this tax was imposed, the telegraph company was required, in addition, to pay taxes to the state, county, and port of Mobile, on its poles, wires, fixtures and other property, at the same rate and to the same extent as other corporations and individuals were required to do. Besides the tax on tangible property, they were

also required to pay a tax of three-quarters of one per cent on their gross receipts within the state. \* \* \* Ordinary occupations are taxed in various ways, and, in most cases, legitimately taxed. But we fail to see how a state can tax a business occupation when it cannot tax the business itself. Of course, the exaction of a license tax as a condition of doing any particular business, is a tax on the occupation; and a tax on the occupation of doing a business is surely a tax on the business."

Referring to the case of *Osborne v. Mobile*; 16 Wall. 479, the court say:

"This court held that the ordinance was not unconstitutional. This was in December term, 1872. In view of the course of decisions which have been made since that time, it is very certain that such an ordinance would now be regarded as repugnant to the power conferred upon Congress to regulate commerce among the several states."

Further on, the court say:

"In our opinion such a construction of the Constitution leads to the conclusion that no state has the right to lay a tax on interstate commerce in any form, whether by way of duties laid on the transportation of the subjects of that commerce or on the receipts derived from that transportation, or on the occupation or business of carrying it on, and the reason is that such taxation is a burden on that commerce, and amounts to a regulation of it, which belongs solely to Congress. This is the result of so many recent cases that citation is hardly necessary." (Citing cases.)

Therefore it seems from the foregoing authorities the question is clearly demonstrated that the

soliciting of orders, or the soliciting of business by an individual or corporation, or the agents of a corporation in foreign states, is not doing business therein, and the state in which such business is solicited has no right to tax, burden or impede such solicitation, or interfere in any way with the solicitation so long as the solicitors or agents of the foreign concern conduct themselves in an orderly manner and solicit for the sale of goods which is not against public morals or good health.

*The keeping of an office in a foreign state by a corporation for the purpose of soliciting business, is not doing business.*

Referring to the cases of *Norfolk & Western Railway Company v. Pennsylvania*, 136 U. S. 114; *McCall v. California*, 136 U. S. 104; *Texas & Pacific Railway Co. v. Davis*, 54 S. W. Rep. 381; *Stockard v. Morgan*, 185 U. S. 27, and *Stratford v. City of Montgomery*, 20 So. Rep. 127, it is very clear that where a corporation maintains merely an office in the state where all the business or transactions performed by it are protected by the commerce clause of the federal constitution, that no tax can be levied against the corporation against its officer or agent as such, as a privilege or occupation tax, license fee or otherwise for the purpose of carrying on their business.

The case of *Norfolk & Western Railway Company v. Pennsylvania*, *supra*, is a good illustration of this proposition. In that case, as we understand it, suit was brought in the Court of Common Pleas in the State of Pennsylvania and involved the right of the state auditor to levy a tax on the railroad company

under the law of 1879. It appeared that the railroad company was a corporation of Virginia and West Virginia and its capital stock was \$25,000,000. The state auditor attempted to impose a tax of \$6,250. It also appears that the company had no part of its landed railroad in the State of Pennsylvania; that it had an office, however, in the state for the use of its officers, stockholder agents and employes, and that it expended a considerable amount of money in Pennsylvania for the purchase of materials and supplies for the use of its road, but with trifling exceptions it owned no property or had no capital invested in the state for corporate purposes, and it had paid no license fees; that its employes in the State of Pennsylvania solicited business to be transported over its line. Judgment was rendered in the trial court for \$6,250 a year on account of its maintaining its office. The Supreme Court of Pennsylvania affirmed that judgment. The case was brought to this court where the judgment of the Supreme Court of Pennsylvania was reversed.

The question first presented was: Was the business transacted in the State of Pennsylvania interstate commerce? Second, If so, was the tax assessed against it for keeping an office in Pennsylvania for the use of its officers, stockholders, agents and employes a tax upon such business? The statute of the state provided no foreign corporation \* \* \* which does not invest and use its capital in this commonwealth shall have an office or offices in this commonwealth for the use of its officers, stockholders, agents or employes, unless it shall have first obtained from the auditor general an annual license

so to do, and for each license every such corporation shall pay into the state treasury, for the use of the commonwealth, annually one-fourth of a mill on each dollar of capital stock which said company is authorized to have, and the auditor general shall not issue a license to any corporation until such license fee shall have been paid.

In reversing the judgment of the Supreme Court of Pennsylvania, this court said:

“It is well settled by numerous decisions of this court that a state cannot, under the guise of a license tax, exclude from its jurisdiction a foreign corporation engaged in interstate commerce, or impose any burdens upon such commerce in its limits.”

Again, on page 120, this court said:

“Was the tax assessed against the company for keeping an office in Philadelphia for the use of its officers, stockholders, agents and employes, a tax upon the business of the company? In other words, was such tax a tax upon any of the means or instruments by which the company was enabled to carry on its business of interstate commerce? We have no hesitancy in answering that question in the affirmative. What was the purpose of the company in establishing an office in the City of Philadelphia? Manifestly for the furtherance of its business interests in the matter of its commercial relations. One of the terms of the contract by which the plaintiff in error became a link in the through line of road referred to in the findings of fact, provided that, ‘It shall be the duty of the line, to solicit and procure traffic for the Great Southern Despatch (the name of said through line) at its own proper cost and expense.’ Again the plaintiff in error

does not exercise, or seek to exercise, in Pennsylvania any privilege or franchise not immediately connected with interstate commerce and required for the purposes thereof. Before establishing its office in Philadelphia it obtained from the secretary of the commonwealth the certificate required by the act of the State Legislature of 1874 enabling it to maintain an office in the state. That office was maintained because of the necessities of the interstate business of the company and for no other purpose. A tax upon it was, therefore, a tax upon the means or instrumentalities of the company's interstate commerce, and as such was in violation of the commercial clause."

In the case of the *Texas & Pacific Railway Company v. Davis*, *supra*, it is held conclusively that a transportation company can indefinitely contract in the state for the shipment of goods to points without the state and it is not doing business in the state.

And in the cases of *Stockard v. Morgan*, *Caldwell v. North Carolina*, *Dozier v. Alabama*, *Stratford v. Montgomery*, all the agents were in the state soliciting orders for goods, the goods were sent to them for delivery, they delivered the goods and collected for them.

The case of the *Wrought Iron Range Co. v. Campen*, 47 S. E. Rep. 658, is another case where the goods were shipped into the state and sold by the manufacturers' salesmen, after the goods were shipped into the state, and it was held they were protected by the commerce clause of the federal constitution.

In other words, in these last cases, while the office was not maintained in the city, instead of maintaining an office by the corporation, the agents were there with definite location and definite offices of their own, and the taxation upon their agency or upon their office was a taxation upon interstate commerce.

THERE ARE SOME WELL ESTABLISHED AUTHORITIES THAT A CORPORATION IS NOT REQUIRED TO PAY LICENSE, PRIVILEGE OR OCCUPATION TAX FOR THE PURPOSE OF MERELY SELLING GOODS INTO A FOREIGN STATE.

Some of these cases we have already cited and referred to, such as:

*Stockard v. Morgan*, 185 U. S. 27.

*Caldwell v. North Carolina*, 187 U. S. 622.

*Stratford v. City Council*, 20 So. 127.

*Wrought Iron Range Co. v. Campen*, 47 S. E. Rep. 658.

*Allen Tyson Co. v. Jones*, 40 S. W. Rep. 393.

In the case of *Mearcham v. Lumber Co.*, 187 Pa. St. 12, the plaintiff was a corporation, duly incorporated in the State of Michigan; its manufacturing operations were there conducted; its capital was there invested. None of it is invested in Pennsylvania. The order for the goods in question was given to the salesman, an agent in Pennsylvania, and by him sent to the plaintiff, who executed the order in Michigan. This is not doing business in the State of Pennsylvania, which makes it necessary to comply with the provisions of the act. In the court's opinion, the court say:

"The words 'doing business' as used in the Act shall not be construed to mean taking orders or making sales by sample or agents coming into our state from another for that purpose. To hold otherwise would make the Act offend against the Constitution of the United States as imposing unlawful restrictions upon interstate commerce. \* \* \* A corporation of one state may send its agents to another to solicit orders for its goods or to contract for the sale thereof, without being embarrassed or obstructed by state requirements as to taking out licenses, filing certificates, establishing resident agencies or like troublesome and expensive conditions."

To the same effect is *Wolff Dryer Co. v. Bigler & Co.*, 192 Pa. St. 466.

The case of *Coit v. Sutton*, 102 Mich. 324, was a case where Coit & Co., an Illinois corporation, was engaged in the manufacture of goods in Illinois, and shipping to its customers in Michigan, on orders given it by mail or taken by its agents in Michigan. It made the contract in Michigan and delivered the goods in Michigan. The corporation had not complied with the Michigan statute which required certain acts of foreign corporations, and provided its contract should be void until such requirements were made. The court held that this statute could not be applied in violation of the federal constitution, and hence did not apply to foreign corporations whose business in Michigan was merely selling through itinerant agents and delivering commodities manufactured outside of the state.

In the case of *Talpoosa Lumber Co. v. Holbert*, 5 N. Y. Sup. 559, the Supreme Court of New York

held that the procuring of orders for goods by commercial agents traveling in the state, which orders have to be transmitted to the home office in another state for approval there, and then the goods shipped from the home place of business to the purchaser in this state, where the foreign corporation has no office or place of business, does not, I think, constitute doing business in this state within the meaning of the statute.

To the same effect is the case of *Maxwell & Co. v. Eddins*, 65 Mo. App. 439, and in that case the court held that the foreign corporation was entitled to sue for the purchase price without complying with the statutory regulations applying to foreign corporations doing business in the state.

In the case of *Toledo Com. Co. v. Glenn Mfg. Co.*, 55 Ohio St., the Supreme Court of Ohio say:

“The holdings are numerous that it is the right of a person and of corporations residing in one state to contract and sell their commodities in another, unrestrained, except where restraint is justified under the police power. This rule does not deny the power of any state to impose conditions upon the right of foreign corporations to establish themselves within its boundaries for the performance, generally, of their business, involving the exercise of corporate franchises and powers, but does not hold that the selling through traveling agents and delivery of goods manufactured outside of the state does not fall directly within the purview of their corporate powers. The pertinent provision of the federal constitution is that ‘The citizens of each state shall be entitled to all the privileges and immunities of the citizens of the several states, and that instrument gives to

Congress the power to regulate commerce among the several states.' The distinction to be noted is that the sale and delivery of the merchandise is a right possessed in common by all citizens of the state. The exercise of the corporate franchises and powers is not. It is a special privilege conferred only upon corporations. And the sale and delivery in one state of goods manufactured in another state by citizens of that state is interstate commerce."

In the case of *Milan M. & N. Co. v. Gorten*, 93 Tenn. 590, it was held that where a foreign manufacturing corporation contracts with a resident to furnish, deliver and put in position for him, within the state, certain milling machine, and accepts for the contract and materials notes secured by mortgage on real estate within the state, that the transaction is interstate commerce, and not subject to state laws, and the notes and mortgages are valid and enforceable notwithstanding the non-compliance by the foreign corporations with the requirements imposed by the state.

In the case of *Davis & Rankin Co. v. Dix*, 64 Fed. Rep. 406, the court say:

"The state legislature cannot deny a non-resident citizen the right to send a canvassing agent here to solicit, by sample or otherwise, contracts for the sale of goods or machinery to be manufactured without the state and shipped into and delivered in the state by the merchant who manufactures. A corporation stands upon the same footing in this respect as an individual."

In the case of *Beard v. The American Publishing Company*, 71 Ala. 60, it was held that receiving sub-

scriptions to newspapers or collecting the money therefor, although the paper was published in a foreign state by a corporation, was not doing business in Alabama within the meaning of the constitutional provision.

In the case of *Doty v. The M. C. Railroad Co.*, 8 Abb. Pr. Rep. 427, it was held that the sale of tickets in New York State by a railroad company, whose entire road and traffic was beyond the limits of the state, was protected by the commerce clause of the federal constitution. To the same effect is *Gunn v. The White Sewing Machine Co.*, 20 S. W. Rep. 591.

In the case of *Bateman v. The Western Star Milling Co.*, 20 S. W. Rep. 930, a Kansas corporation soliciting business in Texas, and sold and shipped merchandise to parties there. The Court of Civil Appeals of Texas held that this was interstate commerce, and that a statute, which, in effect, made contracts void until a corporation doing business in the state had complied with the conditions thereof, and denying them the right to sue for the recovery of the goods, was void as applied to such transactions, and that the corporation could not be denied the right to maintain suits in courts of the state.

To the same effect is *Lyons & Thomas Hardware Co. v. Reading Hardware Co.*, 21 S. W. Rep. 300, and *Zuberbier Co. v. Harris*, 35 S. W. Rep. 403.

In the case of *Havens & Gaddes Co. v. Diamond*, 93 Ill. App. 557, it appears that the Havens & Gaddes Co. was a corporation in Indiana; that it had not complied with the law of Illinois; that it

sent its solicitor into the State of Illinois to solicit orders for its goods, he carrying a sample outfit. The Act of Illinois required every company, incorporated for the purpose of gain, under the laws of any other state or territory, doing business in the State of Illinois, to file a copy of its charter and appoint an agent. It also provided that such foreign corporation could not maintain a suit in the courts of the state. Suit was brought to recover goods which had been obtained through such purchase. The right of foreign corporations to maintain this suit was invoked. It was held in that case that the business was interstate commerce.

A STATE CANNOT DENY TO A CORPORATION OR INDIVIDUAL THE RIGHT TO SEND ITS GOODS IN BULK INTO THE STATE AND SELL THEM SO LONG AS THEY ARE NOT INJURIOUS TO PUBLIC HEALTH AND GOOD MORALS.

This court and many state courts have held that the state has no right to interfere in any way with the sale of goods which are shipped into the state by way of imposing upon the principals license privilege or occupation tax or any discriminating tax or burden, or requiring it to comply with any law which burdens their commerce.

The rule applies to interstate commerce as well as it applies to foreign commerce. Both interstate and foreign commerce are protected by the commerce clause of the federal constitution; that clause applies to one with the same force as it applies to the other.

We are only going to refer to two cases on this subject because these two cases settle the proposi-

tion so conclusively and so thoroughly that further citation of authorities would be useless.

We refer to the case *In re Schollenberger*, 171 U. S. page 1, where this court denied the State of Pennsylvania the right to levy a tax upon Schollenberger, who was the agent of the Oakdale Manufacturing Company, in his occupation of selling oleo-margarine manufactured by his principal in Rhode Island, and shipped to him in packages, which he in turn sold direct to the consumer. In that case the court placed great reliance upon the case of *Gibbons v. Ogden*, 9 Wheat. 1, 193, where it is said:

"The commerce clause extends to every specie of commercial intercourse among the several states, and that it does not stop at the external boundary of a state, and that this power to regulate included the power to prescribe the rule by which commerce is to be governed, and it was held that navigation was included within that power.

"In the case of *Brown v. Maryland*, 12 Wheat. 419, it was stated that this power to regulate commerce could not be stopped at the external boundary of a state, but must enter its interior, and that if the power reached the interior of the state and might be there exercised, it must be capable of authorizing the sale of those articles which it introduces. It was said that 'sale is the object of importation and is an essential ingredient of that intercourse of which importation constitutes a part.' It is as essential an ingredient, as indispensable to the existence of the entire thing, as importation itself. It must be considered as a component part of the power to regulate commerce."

In the case of *Brown v. Maryland*, *supra*, the question was applicable to goods bought in a for-

eign country and introduced into the State of Maryland, and the question arising there is the power of the state over those goods. The commerce clause applies to commerce with foreign nations, and among the several states and with the Indian tribes. Therefore, sale is a part of commerce and the manufacturer of one state who sells his goods in a foreign state is prohibited by the commerce clause. Sale and collection are merely incidental, dependent upon the commerce itself.

It therefore seems clear to us:

*First.* That under this assignment of error, that this annual franchise tax imposed by chapters 19 and 72 of the 29th Legislature is unconstitutional and void as impairing the obligation of the contract entered into between the state and the corporation in 1901 when the corporation gave to the state a certain sum of money and agreed to pay a certain sum for a ten-year permit. When the state, under the Law of 1905 attempted to impose a greater burden and different conditions, taking away some rights and privileges and adding burdens and duties, but granting no further privileges, it impaired the obligation of that contract.

From the foregoing authorities, it is clear that—

1st. The soliciting of orders by traveling salesmen is not doing business.

2d. That the keeping of an office in a foreign state for the purpose of soliciting orders is not doing business.

3rd. That the sale of goods in a foreign state by the consignee, when sold in the condition in which

they are shipped to such foreign state, is not doing business.

4th. That the keeping of an office or an agent in a foreign state by a corporation is not doing business in the state.

5th. That the soliciting of orders by the agent of a foreign corporation in another state is not doing business in the foreign state.

6th. That the mere sale of goods in a foreign state is not doing business in a foreign state by a corporation.

All of these acts may be done and performed by a foreign corporation in any state in the Union without their being compelled to comply with the law of such state regarding the appointing of agents, filing copies of charter, paying privilege taxes or so-called franchise taxes, or any other burden or restriction, and that any of these conditions which are imposed or attempted to be enforced against a foreign corporation, its employes, solicitors, or agents, is a restriction and burden upon interstate commerce and in violation of the commerce clause of the federal constitution and will not be tolerated. As this case now stands it is admitted that the transactions conducted by the plaintiff are purely interstate commerce, and the taxes demanded are a burden upon such interstate commerce, and the case must therefore be reversed. In other words, it must be found, before a state can impose a tax upon a foreign citizen, state or corporation, or a citizen, subject or corporation of another state, that they must be conducting a branch of their business in

the state which attempts to impose the burden upon it, and that means that they must be conducting their business in such a way that the officers and agents in charge have all of the authority of the officers and agents of the company at its home office. The mere selling of the product of a manufacturing company in a foreign state is not doing business in that state so long as it limits itself to the sale of that product. There must be something in addition. There must be an exercise of the corporate franchise. The plaintiff is not exercising in the State of Texas any part of its corporate franchise, except that part which is protected by the commerce clause of the federal constitution, namely, the sale of its goods.

This is admitted by the demurrer.

THE LAWS OF THE 29TH LEGISLATURE, CHAPTERS 19 AND 72, ARE UNCONSTITUTIONAL AND VOID, AND IN VIOLATION OF THE 14TH AMENDMENT OF THE CONSTITUTION OF THE UNITED STATES.

It seems by these laws which we have heretofore quoted that it is the intent of the state to place a tax upon the entire capital and surplus of the corporation, no matter where it may be located. For instance, the tax upon Gaar, Scott & Co., plaintiff in error, is largely upon its property at its manufacturing point, namely, Richmond, Indiana. It has a surplus and it is upon this capital and surplus that the State of Texas is attempting to levy a tax under the Law of 1905 and subsequent to the issuing of the permit to the plaintiff in error, and prior to the expiration of the permit. It is evident that the

tax imposed is upon property without the jurisdiction of the state. *Western Union Tel. Co. v. Kansas*, 216 U. S. 1; *Pullman Palace Car Co. v. Kansas*, 216 U. S. 56; *Southern Ry. v. Greene*, 216 U. S. 400; *Ludwig v. Western Union Tel. Co.*, 216 U. S. 146; *Western Union Tel. Co. v. State of Texas*, 126 S. W. Rep. 1197; and in view of the decisions in the *Union Refrigerator Transit Co. v. Kentucky*, 199 U. S. 202; *Gloucester Ferry Co. v. Pennsylvania*, 114 U. S. 196; *Pennsylvania v. Standard Oil Co.*, 101 Pa. St. 119, that the tax in question is a property tax, that it is unconstitutional and void because it taxes property beyond the jurisdiction of the state and over which the state has no control. It attempts under the Law of 1905, chapter 19, to tax in this case the entire capital and surplus of the corporation. It requires the officers to make return of the amount of the entire capital and surplus of the corporation. It does not attempt to confine the taxing of property within the state of the proportionate amount of the capital stock invested in the business in the state. As we understand the holding in *Western Union Telegraph Company v. Kansas*, *supra*, the permit fee which was required, was imposed upon the entire capital stock of the corporation, no matter where located, and it was there held to be a property tax because it was in excess of the amount which would be required for the ordinary license fee for the examination of papers and filing the same and because it was based upon the entire capital of the corporation; and to the same effect was the other cases above referred to and that because it attempted to tax the entire

capital of the corporation and was taking property without due process of law and violated the 14th amendment of the Constitution of the United States. Such was the ruling in the case of *Gloucester Ferry Co. v. Pennsylvania*, 114 U. S. 196. This court reversed the decision of the state court on the ground that the state could not tax that which was beyond its jurisdiction. In the course of its opinion this court said:

“It is true that the property of corporations engaged in foreign or interstate commerce, as well as the property of corporations engaged in other business, is subject to state taxation, provided always, it be within the jurisdiction of the state. As said by Chief Justice Marshall in *McCulloch v. Maryland*, 4 Wheat. 316, 429, ‘all subjects over which the sovereign power of a state extends are objects of taxation; but those over which it does not extend are, upon the soundest principles, exempt from taxation. This proposition may almost be pronounced self-evident.’”

In the case of the *Union Refrigerator Transit Co. v. Kentucky*, *supra*, an attempt was made to tax the entire rolling stock of the company. It appeared that only a portion of the rolling stock of the company was in the State of Kentucky, although the corporation was there created. It was there held that the tax of that part of the stock was beyond the limits of the state and was in violation of the 14th amendment of the constitution in taking property without due process of law.

In the case of *Pennsylvania v. Standard Oil Co.*, *supra*, where the state attempted to impose a tax

upon all of the capital stock of the company because a small portion of its business was done in Pennsylvania, it was held that the tax in no sense was a franchise or license tax, but a property tax, and that the tax could only be levied upon the portion of the capital invested in the business done in the state.

Upon the ruling of the Supreme Court in the cases above cited, and from these authorities, it is very apparent that the law in question is in violation of the 14th amendment of the Constitution of the United States, and therefore the cause must be reversed.

But we shall follow this question a little further.

Let us show that other provisions of the first paragraph to the 14th amendment are violated.

DISCRIMINATING TAXES ARE ILLEGAL IN VIOLATION OF THE CONSTITUTION OF THE UNITED STATES AND DENY TO CORPORATIONS ENGAGED IN INTERSTATE COMMERCE THE EQUAL PROTECTION OF THE LAW.

Referring to the case of *Ward v. Maryland*, 79 U. S., 418, it is said:

“A statute of Maryland required all traders resident within the state to take out licenses and to pay therefor certain sums regulated by a sliding scale of from \$12 to \$150, according as their stock in trade might vary from \$1,000 to more than \$40,000. The statute also made it a penal offense in any person not being a permanent resident in the state, to sell, offer for sale, or expose for sale, within certain limits in the state, any goods, wares, or merchandise whatever, other than agricultural products and

articles manufactured in Maryland, within the said limits, either by card, sample, or other specimen, or by written or printed trade-list or catalogue, whether such person be the maker or manufacturer thereof or not, without first obtaining a license so to do, for which license (to be renewed annually) a sum of \$300 was to be paid. *Held that the statute imposed a discriminating tax upon non-resident traders trading in the limits mentioned, and that it was pro tanto repugnant to the federal constitution and void.*"

In *Reser v. Umatilla County*, 86 Pacific Rep. 598, a discriminating tax was levied upon sheep pastured in that state brought from a foreign state, as against the property of the state and placing so much tax upon each head of sheep without reference to the value. It was held to be unconstitutional and void.

In the *Laundry* cases, 22 Fed. 705, Judge Deady held that a license tax upon laundry business was a discriminating tax and if it was merely a license, that the amount charged could only be a sufficient amount to pay for the cost of the license and the reasonable supervision of the business.

In *Duckwall v. City of New Albany*, 25 Ind. 283, it was held that a city did not have the power to charge \$300 license fee for running a ferry, there being no authority granted to it in its charter.

In *Eden v. The People*, 161 Ill. 296, it was held that a law prohibiting barber shops from keeping open on Sunday was unconstitutional, as it was a class legislation; not such a law as is authorized by

police power of the state and was the taking of property without due process of law.

In the case of *Oliver v. Washington Mills*, 93 Mass. 268, suit was brought by the treasurer of the commonwealth against a corporation to recover certain taxes from the corporation. It is claimed that the corporation became obliged to reserve from each and every dividend one-fifteenth part of that portion due and payable to holders of stock residing out of the commonwealth within ten days after such dividend should be declared payable; that it had declared a dividend and became liable to the state, but failed to pay the same. The act was entitled "An act to levy a tax on the stock of corporations held by persons whose residence is out of the commonwealth." In the course of the opinion, the court say:

"As has already been intimated, the words 'tax' and 'excise' although often used as synonymous, are to be considered as having entirely distinct and separate significations, under the provisions of the Constitution of Massachusetts, C. I., Ses. 1, Art. 4. The former is a charge apportioned either among the whole people of the state, or those residing within certain districts, municipalities or sections. It is required to be imposed, as we shall more fully explain hereafter, so that, if levied for the public charges of government, it shall be shared according to the estate, real and personal, which each person may possess; or, if raised to defray the cost of some local improvement of a public nature, it shall be borne by those who will receive some special and peculiar benefit or advantage which an expenditure of money for a public object may cause to those on whom the tax is assessed. *An excise, on the other hand,*

*is of a different character. It is based on no rule of apportionment or equality whatever. It is a fixed, absolute and direct charge laid on merchandise, products or commodities, without any regard to the amount belonging to those on whom it may fall, or to any supposed relation between money expended for a public object and as a special benefit to those by whom the charge is to be paid."*

And they held in that case that the tax could not be collected, as it discriminated.

In *Cook on Corporations*, Sec. 572c, it is said:

*"A state may impose on foreign insurance companies a tax equal to the tax levied by the state creating the foreign corporation on corporations foreign to the latter state."*

Again, Sec. 572d:

*"A state statute taxing a corporation having interstate property may levy the tax not only on the tangible property within the state, but on such portion of the earning power of the property as the property in the state bears towards the whole property. This is not interfering with interstate commerce by levying a tax for the privilege of transacting such commerce. \* \* \* But the state may levy a tax on the capital stock of a foreign sleeping-car company which runs its cars through the state, the tax being on such part of the capital stock as the number of miles which its cars run in the state bears to the whole number of miles over which its cars run in all the states."*

Citing *Pullman Car Co. v. Penn.*, 141 U. S. 18, the court holding that a tax on the capital stock on account of the property owned is a tax on the property itself.

"A tax on interstate telegraph messages is unconstitutional. *But a state may tax a foreign telegraph company engaged in interstate telegraph business, the tax being graded according to the amount and value of the company's property in the state measured by miles, and the tax being in place of taxes levied directly on the property.* Such tax is a franchise tax. A city, under authority of a statute, may compel an interstate telegraph company to pay an annual license of \$500 for the privilege of doing business in such city. This is a tax, and is not a condition or restriction on the privilege of doing business in the state. A state cannot prohibit agents of foreign express companies from doing business in the state, except upon obtaining a license. Such a law is an interference with interstate commerce. *A tax may be levied based on the gross receipts, and, if the road is but partly in the state, on a proportion of the gross receipts determined by a mode prescribed by statute.*"

In the case of *Gulf & Ship Island Railroad Co. v. Hewes*, 183 U. S. 67, this court says on page 77:

"Whatever may have been the fluctuations of opinion upon this subject, and it is not to be denied that there are many cases in the state courts *holding that a privilege tax is not a tax upon property, the law in this court, so far as concerns railway franchises, must be deemed to have been settled by the case of Wilmington Railroad v. Reid*, 13 Wall. 264, in which an exemption in the charter of the Wilmington and Raleigh Railway Company of property of said company and the shares therein," from taxation, was decided to extend to a tax upon the franchise and rolling stock. In delivering the opinion of this court, Mr. Justice Davis, observed: "*It is insisted, however, that the tax on the franchise is something entirely distinct from*

*the property of the corporation, and that the legislature therefore, was not inhibited from taxing it. The position is equally unsound with the others taken in this case. Nothing is better settled than that the franchise of a private corporation, which in its application to a railroad is the privilege of running it and taking fare and freight is property, and of the most valuable kind, as it cannot be taken for public use even without compensation. It is true it is not the same sort of property as the rolling stock, roadbed and depot grounds, but it is equally with them covered by the general term 'the property of the company,' and therefore equally within the protection of the charter."*

Citing cases.

*"It follows then, that privilege taxes being taxes upon property are subsequent to the constitutional limitations of 1869, and their exemption was equally repealed as that of ad valorem taxes."*

The case of *McCulloch v. State of Maryland*, 4 Wheaton 415, was one where a law of Maryland imposing a tax on the operation of a bank, was held unconstitutional. Mr. Justice MARSHALL in writing that opinion, said many things which are very applicable at the present time, among them, being the following:

*"Although, among the enumerated powers of government, we do not find the word 'bank,' or 'incorporation,' we find the great powers to lay and collect taxes; to borrow money; to regulate commerce; to declare and conduct war; and to raise and support armies and navies. The sword and the purse, all the external relations, and no inconsiderable portion of the industry of the nation, are intrusted to its government. It can never be pretended that these*

vast powers draw after them others of inferior importance, merely because they are inferior. Such an idea can never be advanced. But it may, with great reason, be contended, that a government, intrusted with such ample powers, on the due execution which the happiness and prosperity of the nation so vitally depends, must also be intrusted with ample means for their execution."

Again:

"If this could not have been asserted, we cannot well comprehend the process of reasoning which maintains, that a power appertaining to sovereignty cannot be connected with that vast portion of it which is granted to the general government, so far as it is calculated to subserve the legitimate objects of that government. The power of creating a corporation, though appertaining to sovereignty, is not, like the power of making war, or levying taxes, or of regulating commerce, a great substantive and independent power, which cannot be implied as incidental to other powers, or used as a means of executing them. It is never the end for which other powers are exercised, but a means by which other objects are accomplished."

Further on:

"If a corporation may be employed indiscriminately with other means to carry into execution the powers of the government, no particular reason can be assigned for excluding the use of a bank, if required for its fiscal operations. To use one, must be within the discretion of congress, if it be an appropriate mode of executing the powers of government.

"It may be objected to this definition, that the power of taxation is not confined to the people and property of a state. It may be exercised upon every object brought within its

jurisdiction. This is true. But to what source do we trace this right? It is obvious, that it is an incident of sovereignty, and is co-extensive with that to which it is an incident. *All subjects over which the sovereign power of a state extends, are objects of taxation; but those over which it does not extend, are upon the soundest principles, exempt from taxation. This proposition may almost be pronounced self-evident.*"

*"The court has bestowed on this subject its most deliberate consideration. The result is a conviction that the states have no power by taxation or otherwise, to retard, impede, burden or in any manner control, the operations of the constitutional laws enacted by Congress to carry into execution the powers vested in the general government. This is, we think, the unavoidable consequence of that supremacy which the constitution has declared."*

Chief Justice FULLER in the case of *Postal Telegraph Cable Co. v. Adams*:

*"Property in a state belonging to a corporation, whether foreign or domestic, engaged in a foreign or interstate commerce, may be taxed, or a tax may be imposed upon the corporation on account of its property within a state and may take the form of a tax for the privilege of exercising its franchises within the state, if the ascertainment of the amount is made dependent in fact on the value of its property situated within the state (the exaction therefore, not being susceptible of exceeding the sum which might be leviable directly thereon) and if payment be not made a condition precedent to the right to carry on the business, but its enforcement left to the ordinary means devised for the collection of taxes."*

In other words, according to that decision the property of a corporation engaged in interstate commerce, which is located within the state, may there be taxed, provided, first, it is based upon the property within the state; and second, that its payment is not made a condition precedent to the right to carry on business but its enforcement left an ordinary means devised for the collection of taxes. The statute in question is contrary to both of these requirements.

In the case of *Guy v. Baltimore*, *supra*, after referring to the cases of *Woodruff v. Parham*, 8 Wallace 123; *Hinson v. Lott*, 8 Wallace 148 and *Ward v. Maryland*, 12 Wallace 418, the court said:

“In view of these and other decisions of this court, it must be regarded as settled that no state can consistently with the federal constitution impose upon the products of other states brought therein for sale or use, or upon citizens because engaged in the sale therein, or the transportation thereto of the products of other states, more onerous public burdens or taxes than it imposes upon the like products of its own territory. If this were not so, it is easy to perceive how the power of Congress to regulate commerce with foreign nations among the several states could be practically annulled, and the quality of the commercial privileges secured by the federal constitution to citizens of the several states be materially abridged and impaired.”

The case of *Weber v. Virginia*, 103 U. S. 344, involved the validity of the statute of Virginia making it a penalty for anyone to sell or offer to sell manufactured articles or machines of other states

or territories (unless he was the owner thereof and taxed as a merchant), unless he should first, take out a license in every county and state where he desired to sell and pay the license tax. This court said:

“By these sections read together we have this result: The agent for the sale of articles manufactured in other states must first obtain a license to sell, for which he is required to pay a specific tax for each county in which he sells or offers to sell them, while the agent for the sale of articles manufactured in the state, if acting for the manufacturer, is not required to take out a license or pay any license tax. Here there is a clear distinction in favor of home manufacturers and against manufacturers of other states. Sales by manufacturers are chiefly effected through agents. A tax upon their agents when thus engaged is therefore a tax upon them, and if this is made to depend upon the foreign character of the articles, that is, upon their having been manufactured within the state, it is to that extent a regulation of commerce in the articles between the states. It matters not whether the tax be laid directly on the articles sold or in the form of a license tax for their sale. If by reason of the foreign character the state can impose a tax upon them or upon the person through whom the sales are effected, the amount of the tax will be a matter resting in their discretion. She may place the tax at so high a figure as to exclude the introduction of the foreign articles and prevent competition with the home product. It was against legislation of this discriminating kind that the framers of the constitution intended to guard when they vested in Congress the power to regulate commerce among the several states.”

If the State of Texas can levy double the tax upon foreign corporations doing an interstate commerce business or which are merely selling its goods in the state than it does on domestic corporations, it may increase the ratio to three, four, or any number of times; that is, it may make the tax prohibitory and deprive corporations of other states from selling their goods or products manufactured within the State of Texas. This the state has not the power to do. It cannot put a greater burden upon either individuals or corporations organized outside of its borders than it places upon its own citizens and corporations. Corporations, therefore, engaged in interstate commerce like the plaintiff in this case, are not required to pay the tax provided by the laws of the State of Texas.

The law denies foreign corporations which may be engaged in interstate commerce equal protection of the laws.

#### THE TAX IN QUESTION IS A PROPERTY TAX.

That the tax in question is a property tax, cannot now be questioned, within the rule in the cases of *Western Union Telegraph Company v. Kansas*, the *Pullman Palace Car Co. v. Kansas*, and the other cases cited under that heading.

#### A PROPERTY TAX IS PURELY A TAX FOR REVENUE.

*San Francisco v. Insurance Company*, 74 Calif. 113, was a suit brought by the city against the insurance company to recover \$441.36 with interest under an act of the legislature entitled "An Act to require the payment of certain proportion premiums

to counties and cities by fire insurance companies not organized under the laws of California but doing business therein, and providing for the disposition of such premiums." The act required agents to pay to the county treasurer, a certain percentage of the premiums to constitute a fund to be known as a Fireman's relief fund. The insurance company claimed the act was unconstitutional and void. It is held that the fund so derived was a tax. In the course of the opinion, the court say:

"A license proper is a permit to do business which could not be done without the license. It is a mere permit. It may be thus licensed and then subject to a license tax. These licenses may not differ in form, but one is a license proper and the other is a franchise tax, imposed for the purpose of revenue. This business, being first licensed, and then in a subsequent law subjected to a license in the form of a tax, the last law in no way intimating that the previous license is withdrawn unless the imposition is paid, the presumption is very strong that the exaction is for revenue purposes, and was not intended as a condition."

Further on the court say: "This tax is purely one for revenue."

In the case of *Parker v. Insurance Company*, 42 La. 429, the act of the legislature of the state which was in question, was as follows:

"The capital, etc., so determined and certified, shall be subject to taxation, the same as the capital of fire insurance companies organized under the laws of this state, to be levied, assessed and collected as prescribed by the laws of this state, at such place in this state as such foreign insurance company shall have its prin-

capital office; provided, however, that said capital has not been taxed and paid by the main agency or company in any other state, then taxation shall be levied upon the gross receipts, less deductions governing companies organized under the laws of this state."

The defendant failed to pay the taxes for certain years and denied its liability therefor, and the act was held unconstitutional because the tax was not equal and uniform.

*"A state may lay a tax on the 'corporate franchise or business' of a foreign corporation doing business within the state; and when a tax is imposed on the 'business' of a foreign corporation doing business in the state, the court will not presume that the tax is imposed on the business done outside the state (which might be unconstitutional) although the tax is computed on the capital stock of the corporation. A foreign corporation, by doing business within a state, does not bring its capital into the state constructively, so as to subject to taxation its property outside of the state."*

Taylor on Private Corporations, 479:

*"Neither can a state tax the entire track and equipment, or the total capital stock of a railroad company whose track lies partly without the boundaries of the state; but may tax only the portion of the road within its limits, or such proportion of the total capital stock as represents that portion."*

See, also:

*Commonwealth v. Standard Oil Co.*, 101 Pa. St. 119.

In *Ellis v. Frazier*, 63 Pac. Rep. 642 (Oregon), it was held that a tax of \$1.25 on bicycles in certain counties, for the purpose of maintaining, building, repairing and operating roads, was unconstitutional and void because the tax was on the bicycle without regard to the value; was not uniform, and again, because it was double taxation, and not a tax on an *ad valorem* basis.

In the case of *Reser v. Umatilla County*, 86 Pac. Rep. 595 (Oregon), it was held:

“Laws of 1905, p. 268, c. 156, entitled ‘An act to tax all foreign sheep coming into the state,’ etc., for the purpose of pasturage, or being driven through the state, and imposing a tax of 20 cents a head on sheep pasturing within the state and 5 cents a head for each and every county through which such sheep shall be driven, was an act imposing a tax for the purpose of revenue and was therefore in violation of Const. Art. 9, I, for inequality and non-uniformity.”

The court says that it is purely a tax for revenue, and not being uniform and equal, nor levied with reference to the value of the property, is void.

The case of *Louisville & N. R. Co. v. Wright*, 116 Fed. Rep. 670, was a suit brought to enjoin the comptroller general of Georgia from collecting from the railroad company, taxes on certain shares of stock in the Western Railway Company. Injunction sustained and on appeal, was affirmed. In the course of the opinion, the court say:

“Justice requires that the burdens of government shall, as far as is practicable, be laid

equally on all, and, if property is taxed once in one way, it would ordinarily be wrong to tax it again in another way, when the burden of both taxes falls on the same person. Sometimes tax laws have that effect, but if they do it is because the legislature has unmistakably so enacted. All presumptions are against such an imposition."

See, also:

Desty on Taxation, p. 199.

Cooley on Taxation, p. 165.

From the foregoing authorities it will be seen that a state cannot impose a burden upon a foreign corporation when once admitted into the state greater than that imposed upon corporations of its own state, and can impose that burden only to the extent and proportion which the capital or business of the foreign corporation is represented in the state.

As is well said in Taylor on Corporations, page 479:

"Neither can the state tax the entire track and equipment, nor the total capital stock of a railroad company whose track lies partly without the boundaries of the state, but may tax only the portion of the road within its limits or such portion of the total capital stock as represented that portion."

#### GRADUATED TAXES ARE ILLEGAL.

Section 48, article 3 of the Constitution of Texas, provides that the legislature shall not have the right to levy taxes or impose burdens upon the people except to raise revenue sufficient for the economical administration of the government.

Article 8, section 1, provides that taxation shall be equal and uniform. All property in this state whether owned by natural persons or corporations other than municipal shall be taxed in proportion to its value, which shall be ascertained as may be provided by law. The legislature may impose a poll tax. It may also impose occupation taxes both upon natural persons and upon corporations other than municipal doing any business in this state.

Section 2 provides, among other things, that all occupation taxes shall be equal and uniform upon the same class of subjects within the limits of the territory levying the tax.

Section 3 provides that taxes shall be levied and collected by general laws for public purposes only.

The so-called franchise tax attempted to be imposed by chapter 19 is a part of the revenue act of the state. The act is passed for the purpose of raising revenue. It provides for a tax upon the total amount of capital and surplus no matter where located. It does not purport to be an occupation tax; it is not intended as an *ad valorem* tax. It provides that foreign corporations with an authorized capital of \$100,000 shall pay \$1 on each \$1,000 dollars of its authorized capital up to \$100,000, and \$1 on each \$5,000 or in excess of \$100,000 up to \$1,000,000, and \$1 on each \$20,000 of the fractional part in excess of \$1,000,000 to \$10,000,000, and \$1 on each \$5,000 in excess of \$10,000,000; but that no tax shall be less than \$25. It provides that domestic corporations shall pay \$1 on each \$2,000 of its authorized capital up to \$200,000, \$1 on each

\$10,000 in excess thereof up to \$1,000,000, and \$1 on each \$20,000 in excess thereof up to \$10,000,000, and \$1 on each \$50,000 in excess of \$10,000,000, and that such tax shall not be less than \$10 in any case. And this tax not only applies to the capital but to the surplus; that is to say, if a foreign corporation has an authorized capital of \$100,000, no matter what its property or assets may be or no matter where or what its capital is, it must pay \$100 while a domestic corporation will pay \$50. If the capital and surplus exceed \$100,000 a foreign corporation must pay \$100, and in addition thereto \$1 on each \$5,000 in excess of \$100,000 up to \$1,000,000, while the domestic corporation pays just one-half of this sum.

The tax is, therefore, a graduated tax, making the smaller corporation pay in proportion a greater amount of tax than the larger corporation, and for this reason the tax is wholly illegal.

This position is supported by the authorities which we herewith review:

The case of *Schuster v. City of Louisville*, 89 S. W. Rep. 689, was a suit to restrain the City of Louisville from the enforcement of an ordinance. The lower court denied the injunction. It involved the constitutionality and the validity of a law passed in 1904 by the city under an Act of the General Assembly passed March 18, 1904, authorizing the city to levy a graduated tax upon business occupations. It was graduated according to the amount of the gross annual sales and classified different kinds of business. The General Assembly passed the law

authorizing the city to make this tax under an amendment to the constitution which provided that the General Assembly may by general laws only, provide for the payment of license fees, franchise, stock used for breeding purposes, the various trades and occupations, and may by general laws, delegate the power to counties, towns and cities to impose license fees, and other provisions. Another provision of the constitution provides that taxes shall be collected for public purposes only; that they shall be uniform and levied and collected by general laws. The court say:

“By the ordinance in question it will be observed that a sliding scale is made as to the merchants and manufacturers and that the tax decreases with the amount of the sales or manufactured product. In other words, the merchant or manufacturer of small means is made to pay a tax at a higher rate than the merchant or manufacturer of larger means. The constitution allows no such discrimination. The rich and the poor must be taxed alike. There cannot be one rate for the large merchant and a different rate for his poor neighbor. \* \* \* The *ad valorem* tax in the city varies from year to year. The purpose of the ordinance seems to be to make a permanent rate for the classes named, which is unaffected by the fact that the tax rate on other property may go up or down as the years go by. This cannot be done. The tax based upon income, license or franchise is simply a substitute for the *ad valorem* tax, and must be levied yearly according to the *ad valorem* levy, and in such way as to produce practical equality between all classes of property, whenever a new *ad valorem* ordinance is passed.”

The case of *Cook County v. Fairbanks et al.*, 222 Ill. 578, was a suit brought by the executors of the estate of Nathaniel K. Fairbank to recover from the County of Cook, the sum of \$1,250, which they as executors under the will of Fairbank, had paid to the clerk of the Probate Court for the docket fee provided to be paid under an act entitled: "An Act to provide for fees of probate courts in counties of the third class," approved May 29, 1879, and by various amendments thereto. The docket fee was imposed on a sliding scale as to the value of the estate. It was held that the docket fee was in the nature of a tax for the purpose of raising revenue for public objects. It cannot be sustained as an inheritance tax; the act is unconstitutional as it is not uniform in its operation; that this fee paid under protest, can be recovered back.

"The amount sought to be retained by the probate clerk was therefore, properly speaking, not a fee, but was a burden or charge imposed upon said estate, to raise money for public purposes, regardless of the value of the services actually rendered the estate, which is in conflict with the constitutional provision hereinbefore set forth, and which would bring said burden or charge within the well recognized definition of a tax, which may, in a general sense, be defined to be a burden or charge imposed by the legislative power of the state upon persons or property for public uses."

*Dalrymple v. City of Milwaukee*, 53 Wis. 178.

In the case of *State v. Case*, 1 L. R. A. 152, the Supreme Court of the State of Washing-

ton, where a like fee was imposed and a like result announced by that court, the court said:

"It is true the statute calls the charge a 'fee', but if it is apparent upon the face of the statute that the charge is, in fact, not based upon actual and necessary services rendered or to be rendered, but is based entirely upon a property valuation, thereby partaking of the nature of a tax, it would seem to be wholly immaterial by what name the statute may designate it."

*State v. Gorman*, 40 Minn. 232, is a case where the same kind of a fee paid to the probate clerk on the value of an estate, is held to be a tax, and in *Fatjo v. Pfister*, 117 Calif. 83, where mandamus was sought to compel the clerk to file an inventory and appraisement, which he had refused to do until the sum of \$200 was paid him as fees. The statute required the payment of \$5 on the filing of the petition for letters of administration, and an additional payment of one dollar for each \$1000 of the appraised valuation of the estate in excess of \$3,000, as shown by the inventory and appraisement. The Supreme Court held the charge to be a tax, saying:

"It is perfectly plain that the legislature has attempted, by that portion of section 1 above quoted, to levy a property tax upon all estates of decedents, infants and incompetents. The *ad valorem* charge for filing the inventory is in no sense a fee or compensation for the services of the officer, which are the same, as respects this matter, in every estate, large or small. To call it a fee is a transparent evasion."

See, also:

Clark & Marshall on Corporations, page 760, section 291.

The legislature of Texas seems to be unable to find a time when to stop, or where to stop, or how to stop taxation. The law as found in the Revised statutes of 1895, section 5046, provides for a state *ad valorem* tax for general purposes; it provides for taxes which levied a tax of 25 cents on each \$100 of all property owned in the state on the first day of January of the year.

The state had an occupation tax. Section 5049 provides that every person, firm, corporation or association of persons desiring to sell goods, wares or merchandise within the state, shall, before pursuing such occupation, pay the tax and take out a license to pursue the occupation of a merchant of the class to which he properly belongs according to his annual purchases as provided by law. The act provides the amount of these occupation taxes which shall be paid, and the act defines a merchant to be any person, firm or association of persons engaged in buying or selling lumber, shingles, goods, wares and merchandise of any kind whatever.

This amended act, known as chapter 19 of the laws of 1905 of the Twenty-ninth Legislature of Texas, is an amendment of section 5243i and 5243j of the revenue laws as adopted in the Code of 1895. They are a part of the revenue law to raise revenue for general purposes by taxation upon property.

Section 2439 contained the provisions for the payment of the permit. The constitution makes provision for two taxes, namely, an *ad valorem* tax and an occupation tax. Both of these taxes are in force

in the State of Texas, and the taxes are being properly collected or are presumed to be, and every corporation or merchant is supposed to be paying such taxes as may be levied against him or it on the amount of its goods; and, second, on the amount of its purchases and sales.

This so-called franchise tax has no warrant in the constitution of the state; it is not uniform; it is graduated; it makes the lesser property owner bear an unequal proportion of his burdens if the tax can be considered at all. It is the intention of the people of Texas that all taxes shall be equal and uniform. This tax is wholly unequal, not uniform; it violates the constitution, and the act must be declared to be null and void.

THE LAW CANNOT, AFTER HAVING GRANTED A PERMIT TO A FOREIGN CORPORATION, TAX THEM GREATER THAN A DOMESTIC CORPORATION.

Article 8, section 1 of the constitution provides that taxation shall be equal and uniform.

Article 8, section 2, provides that all taxes shall be equal and uniform upon the same class of subjects.

Section 5049 of the Revised Statutes of 1895 defines who are merchants, and provides what occupation taxes must be paid by merchants. It classes such a corporation as this as a merchant, and having classed it as a merchant under section 2, article 8, of the constitution, the taxes attempted to be imposed upon it must be equal and uniform with the taxes imposed upon a domestic corporation.

There can be no discrimination. This law is, therefore, void.

If the tax imposed by chapters 19 and 72, General Laws of 1905, is not a property tax, it is an occupation tax and invalid because not equal and uniform upon the same class of subjects.

In the case of the *Pullman Palace Car Co. v. State*, 64 Texas 277, the court said:

“ ‘The subject of taxation is the thing or business done; the occupation followed for and on account of which the tax is imposed on persons and corporations that pursue it,’ or the subject of taxation is the privilege of doing business as a corporation. Whichever it is the tax is not equal and uniform upon the same class of subjects. If it’s the thing or business done that is taxed, then a foreign corporation is taxed double for doing the same thing or business that a domestic corporation does; and, so if the tax is for the privilege of doing business as a corporation. Again, it is a scaling or graduated tax and is not equal and uniform upon foreign corporations doing the same thing or business nor upon the domestic corporations doing the same thing or business.”

For the reason that the larger the corporation or amount of capital stock and surplus, the less in proportion is the amount of taxes.

All these questions go to the question of taking property without due process of law.

The third assignment of error was to the effect that discriminating taxes or taxes which discriminate against property of a foreign manufacturer in favor of a domestic manufacturer, are unconsti-

tutional and void, so we claim that taxes which discriminate against the smaller and in favor of the larger, are likewise unconstitutional and void.

Beginning with the case of *Ward v. Maryland*, we find the amount of taxes ranged from \$12.50 to \$150, according as their stock might in trade vary from \$1,000 to \$40,000. The tax of \$12 on \$1,000 or 12 cents on \$100, is less a great deal than a tax of \$150 on \$40,000. A tax of \$150 on \$40,000 would be less than 4 $\frac{1}{4}$  cents on \$100.

The case of *Schuster v. City of Louisville*, 89 S. W. Rep. 689, where it is said the rich and poor must be taxed alike; that there cannot be one rate for the large merchant and a different rate for his poor neighbor. The tax in that case was a sliding scale. The merchant with the small capitalization paid a larger rate in proportion than the larger manufacturer.

So also the case of *Cook County v. Fairbanks et al.*, 222 Ill. 578, where it was held that the docket fee to be paid by executors and administrators, was a tax. It was imposed on a sliding scale, larger estates paying less in proportion than a small estate. It was a burden not a fee. It was not for services rendered, it was for revenue purposes, and it may be said that which is paid to any official of the state which is greater than the burden of the office demands, is a tax for revenue, and when it becomes a tax for revenue, it must be uniform on all classes of subjects, rich and poor and upon all property of the same class alike; there must be no favor of one class of persons over another—there must

be no favor of one class of property over another. Each should bear its just proportion, and for these reasons we say that the argument herein applies to the third assignment of error in that the taxing is unequal and not uniform; that it discriminates in favor of corporations organized in the state and those permitted to enter the state to do a like business; it is a tax for revenue purpose and therefore a burden not authorized under the uniform clause of the 14th amendment of the Constitution of the United States.

### DUE PROCESS OF LAW

CHAPTERS 19 AND 72 OF THE 29TH LEGISLATURE OF THE STATE OF TEXAS, SESSIONS LAWS OF 1905, ARE IN VIOLATION OF THE 14TH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES, IN THAT THEY ATTEMPT TO TAKE PROPERTY WITHOUT DUE PROCESS OF LAW.

As has been said in the second and third subdivisions of this argument, and is again called to the attention of the court, these laws tax property beyond the jurisdiction of the state. The Laws of 1905 of Texas require a foreign corporation which has obtained a permit or a corporation about to obtain a permit, to pay a tax for that purpose upon its entire capital stock and surplus, each year, said tax being double the tax required of a domestic corporation. It requires that tax from the corporation in order to obtain a permit, and it requires it upon the whole of the capital stock and surplus of the corporation, although but a very small

part or portion may actually be engaged in the State of Texas.

For instance, in the case at bar Gaar, Scott & Company have a large manufacturing plant in the State of Indiana. According to the reports made and the taxes paid, under the law, under protest, it has several hundred thousand dollars of capital stock and surplus, but it has merely an office and a few traction engines and threshers in the City of Dallas, in the State of Texas, possibly not more than one one-hundredth part of its property, still the State of Texas says to it, before you can sell one of those traction engines or maintain the office for the purpose of soliciting trade, you must take out a permit under the laws of the state, which permit will cost you a large amount of money annually, and it is based upon your entire capital stock and what may be called a surplus.

Undoubtedly, 90% of that capital stock and surplus is invested in its manufacturing plant and business at Richmond, Indiana. The State of Texas, therefore, is attempting to levy each year for a permit to do business, taxed upon property located in Indiana and property levied upon other branch houses. So it is clearly a tax on property outside of the state, and as it is an annual tax and a revenue tax and declared such by the law and is to go into the general treasury of the state, it becomes a general revenue measure and the legislature appropriates that money the same as it appropriates the money derived from the taxes upon its real estate and personal property located within the state.

The act itself does not make any specific appropriation of the money in question. Therefore it becomes, as we say, a revenue tax, taxed for the maintenance of the office, officers and general government of the state.

And we notice at the end of these various acts, the following:

In Chap. 19, Sec. 2, of the Laws of 1905:

“The near approach of the time (March 1) on or before which, by existing law, notices of the franchise tax must be sent out, and the growing deficit in the state treasury, create an imperative public necessity for the suspension of the constitutional rule requiring bills to be read on three several days, and an emergency demanding that this act take effect and be in force from and after its passage; and it is so enacted.”

This act was approved March 1, 1905.

In Chapter 72 of the Laws of 1905, we find the following:

“The near approach of the time (May 1st) on or before which the franchise tax due and payable by corporations must be paid, and the growing deficit in the state treasury, create an imperative public necessity for the suspension of the constitutional rule requiring bills to be read on three several days, and an emergency demanding that this act take effect and be in force from and after its passage; and it is so enacted.”

This act was approved April 11, 1905.

These bills, therefore, on their face declare they are for general revenue purposes; that it was the intent of the State Legislature to create a revenue

fund from all taxes upon corporations of the nature in question. These bills of 1905, as we say, enlarge the taxes which had theretofore been imposed upon foreign corporations. While we are not complaining here that the laws in force in 1901 were unconstitutional and void, necessarily they were unconstitutional and void because they contained exactly the same provisions for the payment of an annual franchise tax and required the foreign corporation to pay a larger tax for the same purpose than a domestic corporation, and a tax upon its entire capital. But when they double that liability and when they impose different restrictions and we have complied with the law, although it may be unconstitutional and void, they can not again add burdens which in themselves are vicious, unconstitutional and void, and violate the 14th amendment of the constitution of the United States by taking property without due process of law.

So, we again refer to the cases of the *Western Union Telegraph Company v. Kansas*, *Pullman Palace Car Co. v. Kansas*, *Ludwig v. Arkansas*, *Greene v. Southern Railway Co.*, *Interstate Text Book Co. v. Pigg*, *Union Refrigerator Transit Co. v. Kentucky*, 199 U. S. 194; *Ward v. Maryland*, 79 U. S. 418; *Brown v. Maryland*, 12 Wheaton, 449; *Gibbons v. Ogden*, 9 Wheaton, 1; *Stockard v. Morgan*, 185 U. S. 27; and the many other cases which are referred to in those cases; and we would also refer to the case of *Western Union Telegraph Co. v. Texas*, 126 Texas, 1197, where the Supreme Court of the state reversed the Court of Appeals of the state, the Appellate Court

having affirmed the judgment of the District Court of the state, in which was involved a law somewhat similar to the law of the State of Kansas, and which is found in the laws of 1907 of the State of Texas, page 500, chapter 22, which requires that every foreign corporation obtaining a permit to do business in the state, pay fees as follows: \$50 for the first \$100,000 of its capital, and \$10 on each additional \$10,000, or fractional part thereof. A long opinion is rendered by the Court of Appeals of the State of Texas, 121 S. W. 194, upholding this law the same as it upheld the law which is in force here; but on the authority of this court in the case of the *Pullman Palace Car Co. v. Kansas*, and in a mere memorandum opinion the Supreme Court of the state held that the law was unconstitutional and reversed the judgment of the Court of Appeals, and the District Court, without reason.

The law of 1907 is a subsequent law to the law which is enforced here, and the law which is attempted now to be enforced against foreign corporations similar to the one here, and is entitled, "An Act relating to fees charged by the Secretary of State," and like all other acts it says that "owing to the growing deficit in the state treasury it creates an imperative public necessity for the suspension of the constitutional rule requiring bills to be read on three several days, and an emergency demanding that this act take effect and be in force from and after its passage," which was May 16, 1907.

It will be noticed in the Act of 1907, that each private corporation obtaining a permit shall pay as follows: \$50 when the charter is filed; provided

that if the authorized capital stock shall exceed \$10,000 for each additional \$10,000, or fractional part thereof, an additional \$10; for each commission to every officer, elected or appointed in the state, a fee of \$1.

This law of 1907 materially changes the law of 1905; therefore, we say this franchise tax law imposed by chapters 19 and 72 of the 29th Legislature of the State of Texas, of the law of 1905, is unconstitutional and void for the reasons: *first*, that it imposes unequal burdens upon property and is therefore taking property without due process of law; *second*, that it taxes property beyond the jurisdiction of the state, as is said in *Western Union Telegraph Co. v. Kansas*, and is therefore unconstitutional and void; and *third*, it imposes an obligation upon foreign corporations to comply with the law before it can maintain any action in the courts of the state, and thereby causes an unreasonable burden upon foreign corporations engaged in interstate commerce and therefore takes property without due process of law.

#### CORPORATIONS ARE PERSONS.

Under this heading of the decisions that the property of this corporation is being taken without due process of law and violates the 14th amendment in several of its conditions, and the denial in effect of the court of Texas that a corporation is a person, in any sense of the word, we refer to the cases decided by this court and other courts to the effect that a corporation is a *person* for certain purposes, if not for all. In the cases of *Santa Clara County v. The*

*Southern Pacific Ry. Co.*, 118 U. S. 394; *Charlotte, etc. R. R. Co. v. Gibbes*, 142 U. S. 386, 391; *Gulf, Colorado & Santa Fe R. R. Co. v. Ellis*, 165 U. S. 150, it is practically held that corporations are persons within the meaning of the 14th amendment of the constitution of the United States, and what amounts to denial of the protection or deprivation of property without due process of law, is denial of the equal protection of the law. Sometimes it seems it is difficult to determine, especially where the question relates to the property of a *quasi* public corporation and the extent to which it may be subjected to public control.

*In re Thornton*, 12 Fed. Rep. 538, note on page 553, among the privileges and immunities enumerated, it is said:

“The right to pursue a lawful employment in a lawful manner, and to be exempt from any higher taxes or exercises than those imposed on its own citizens.”

Citing *Ward v. Maryland*, 12 Wall. 430; *Wiley v. Parmer*, 14 Ala., 627; and *Oliver v. Washington Mills*, 11 Allen, 268.

The 14th amendment of the constitution of the United States is a declaration that no state shall deny to any person within its jurisdiction the equal protection of the laws, and imposes a limitation upon the exercise of all the powers of the state which can touch the individual or his property, including that of taxation.

“The ‘equal protection of the laws’ to any one implies not only that the means for the se-

curity to his private rights shall be available to him on the same terms with others, but also that he shall be exempt from any greater burdens or charges than such as are equally imposed upon by others under like circumstances. This equal protection forbids unequal exactions of any kind and among them, that of unequal taxation.

“Uniformity of taxation requires uniformity in the mode of assessment as well as in the rate or percentage charge.

“Persons do not lose their right or equal protection granted by the Fourteenth Amendment to the Constitution when they form themselves into a corporation under the laws.

“Whatever property a corporation lawfully acquires is held under the same guarantees which protect the property of natural persons from spoliation.

“The proceedings for assessment of property, that is, the ascertainment of its value upon evidence taken is judicial in its character and to its validity, the law authorizing must provide some kind of notice and an opportunity to be heard respecting it before the proceeding becomes final or it will want the essential ingredient of due process of law. The notice may be given by personal citation. It is usually given by statute prescribing the time and place where parties may be held before boards appointed for the erection of errors in assessment.”

Such is the quotation taken from 9 Sawyer, 166.

There is no doubt that corporations, composed as they are of persons, as has been repeatedly held, are persons within the meaning of the 14th amendment to the Constitution of the United States and are citizens of the United States as recognized by the statutes of the United States in removal cases. They have certain inalienable rights, and while it may be

said that one state may prohibit a corporation of another state from coming into its borders and doing business, when it does permit such foreign corporation to come within its borders to do business, it must treat it with equal consideration with that of a domestic corporation. There can be no barrier between building up an imaginary line drawn between the states which will in any way affect the commodities created by one state and place a greater burden upon them in the sale in another state greater than that placed upon the commodity created in the state where the sale is to be made.

In this case the Court of Appeals of Texas it will be noticed in its opinion did not dispose in any manner of the question of the taking of property without due process of law. It avoided it—it thought it had sufficient to affirm the judgment of the District Court without passing upon the questions of due process of law. It did pass upon the question of the burden upon interstate commerce—it did say the payment was voluntary.

#### VOLUNTARY PAYMENT.

The demurrer in this case admits that the tax was paid to the secretary of state and that he received notice contemporaneously with the receipt of the money that the tax violated the Constitution of the State of Texas; that the law under which it was imposed violated the Constitution of the United States and was void and that the plaintiff in error would sue to recover it back. These protests are contained in the petition. Notwithstanding these protests the Court of Appeals have held that the tax was vol-

untarilly paid. The law imposes a 25% penalty if these taxes are not paid; it imposes a forfeiture if the taxes are not paid; it imposes this penalty without judicial ascertainment; it imposes the forfeiture without judicial sanction. It creates in the office of the secretary of state a power to fix penalties, to declare forfeitures to take away a valuable right without notice, without hearing, without contest.

These taxes were not voluntarily paid; they were paid because there was a time fixed in which they must be paid; there was no board to appeal to for a review or revision; the law fixed the amount, the secretary of state had to execute the law. A tax is not voluntarily paid, as will appear hereafter, when it is paid under protest. In this case the giving of the protest at the time of payment of the tax, is admitted; there is no dispute over the fact; there is no dispute over the fact these were paid under compulsion to avoid a 25% penalty, to avoid the forfeiture that was required by law. Chapter 19 of the laws of 1905 did not require the defendant or any officer of the state to notify the plaintiff there had been a change in the law which had previously been in force—that a penalty had been added if the tax was not paid by May 1st and that the secretary of state or any other officer would exercise his authority under that law to forfeit the permit on July 1st if the tax attempted by said officer, was not paid on or before July 1st, with the 25% penalty. There was no redress anywhere, the secretary of state had no authority but that of a taxing officer to determine, first, the amount of the tax; second, to add the penalty; third, to declare forfeiture. He was act-

ing in a judicial and ministerial capacity. There was no appeal from any decision which he might render. He was notified that the taxes were illegal. He accepted the tax under such notice; the tax was paid to him by the plaintiff with the right reserved in the plaintiff to recover them back. He can not now be heard to say that they were paid voluntarily.

Somewhere it is said that the plaintiff could have enjoined the defendant on the ground of unconstitutionality of the law. But in the case of *Arkansas Building & Loan Association v. Madden*, 175 U. S. 269, it was held by this court that:

“The party of whom an illegal tax is collected has ordinarily ample remedy, either by action against the officer making the collection or the body to whom the tax is paid. Here such remedy existed. If the tax was illegal the plaintiff protesting against its enforcement might have had his action, after it was paid, against the officer or the city to recover back the money, or he might have prosecuted either for his damages. No irreparable injury would have followed to him from its collection. Nor would he have been compelled to resort to a multiplicity of suits to determine his rights.”

In that case the former law of the State of Texas was invoked through a court of equity to enjoin the collection of a tax similar to the tax in this case. In this case tax was paid in conformity with the view expressed in that opinion under protest, and suit is brought here to recover it back.

Following the decision in that case, it is proper for us to pay these taxes under protest, notify the secretary of state that they were illegal; it was his

duty to protect himself and upon judgment being rendered against him, have the money to refund to the corporation. If we could have shown that the defendant was insolvent, or that there was a liability of a multiplicity of suits, or that there was some other equitable ground, we might have had equitable relief, but this suit is brought against an officer of a state who was perfectly solvent, and therefore under the ruling in the case of *Arkansas Building & Loan Association v. Madden*, *supra*, we understand that the suit must be at law.

In that case this court quotes from the case of *Dows v. Chicago*, 11 Wall. 108, and says:

"In *Dows v. Chicago*, which has been frequently cited with approval, it was said by Mister Justice FIELD, speaking for the court: 'The party of whom an illegal tax is collected has, ordinarily, ample remedy, either by action against the officer making the collection or the body to whom the tax is paid. Here such a remedy existed. If the tax was illegal, the plaintiff protesting against its enforcement might have had his action, after it was paid, against the officers or the city to recover back the money, or he might have prosecuted either for his damages. No irreparable injury would have followed to him for its collection, nor would he have been compelled to resort to a multiplicity of suits to determine his right.'"

Further on in the course of the opinion the court says:

"The grievance complained of in this case is that the Arkansas corporation entered on the transaction of business in Texas at a time when the annual franchise or license tax was \$10 and

that it is now required to pay \$205 by subsequent law, which it alleges is unconstitutional. The penalty denounced on failure to pay is the forfeiture of the right to do business in the state, and complainant averred that if that forfeiture was declared it would be subjected to irreparable injury and a multiplicity of suits. It is on these grounds of equity and interposition that the aid of the Circuit Court was sought to restrain the discharge by a state officer of duties imposed on him by the law of the state, and to adjudicate as to the validity of that law; but the bill of complaint did not set forth any facts tending to show that the complainant could not escape the forfeiture by payment of the \$205 under protest and recover back the money so paid if the law should be held void. *We assume that the payment would under the circumstances detailed be compulsory and not voluntary, and no reason is perceived where the rule permitting recovery back would not apply.* That rule as applicable here is that an action will lie for money paid, under compulsion, or an illegal demand, the person making it being notified that his right to do so is contested. *Eliot v. Swartwout*, 10 Pet. 137; *Bend v. Hoyt*, 13 Pet. 263; *Philadelphia v. Collector*, 5 Wall. 720, 731; *Swift Company v. United States*, 111 U. S. 22. The principle is thus stated by Gaines, J., in *Taylor v. Hall*, 71 Texas 213: 'The law is established that when a person, by the compulsion of the color of legal process or of seizure of his person or goods, pays money unlawfully demanded, he may recover it back.' The fact that the defendant is a state official is not in itself a defense, and our attention has been called to no statute of Texas which substitutes any other for the common law rule."

Finally, the question is, were these taxes paid under protest or voluntarily? As it has appeared

through this argument incidentally, and in the opinion of the Court of Appeals of the State of Texas, the plaintiff in error paid the tax under protest, but the protest, according to the decision of the Court of Appeals, did not amount to anything, and therefore it was a voluntary payment and the tax cannot now be recovered back. The protest is set out in the petition. It is admitted that this protest was filed at the time of the payment of the tax, and it is shown that if it were not paid at that time a penalty of 25 per cent was added. It is shown that the state had taken away from the corporation or abrogated its contract with the corporation to the effect that the corporation was no longer entitled to notice which was provided for in the law in force at the time the contract was entered into by the state, but the law of 1905 made it incumbent upon the corporation to make its return and pay the tax without the notice or subject itself to the 25 per cent penalty. The protest notified the state officer that the taxes were illegal and void and that the law under which they were imposed violated the constitution of the state and the Constitution of the United States. The taxing officer of the state who was authorized to levy and take the tax, accepted this tax notwithstanding the protest. He knew at the time that he received the tax that the party paying the tax denied his right to take them because the law under which he was acting was illegal. Taxes like these have been declared recently by the Supreme Court in the cases heretofore cited, namely *Western Union Telegraph Co. v. Kansas, supra*; *Pullman Palace Car Co. v. Kansas, supra*; *Ludwig*

*v. Arkansas, supra; Green v. Southern Railroad Co., supra*, to be void, because they tax property beyond the state. That they were taking property without due process of law, and so it was held in the case of the *Union Refrigerator Transit Co. v. Kentucky*, that they were unconstitutional and void, because they were taking property without due process of law.

In what form must this protest be? In other words have you got to more than say that you pay the tax under protest on the ground that the tax is imposed under a law which violates the Federal constitution, and if the taxing officer takes it and makes a note of it, or have you got to go on and point out to him the many reasons and conditions under which the law creating the tax is unconstitutional and void, and if you fail because you don't point out the right one, then you must fail entirely; or is it sufficient to point out to him that the law under which he is acting violates the Federal constitution and imposes unreasonable burdens upon interstate commerce and takes property without due process of law?

From our examination of authorities it seems that all a person has to do in this respect is to bring to the attention of the party receiving the tax, by some sort of a notice concurrent with his receiving the tax, that the tax is illegal; that the law under which it is imposed violates the Constitution of the United States or the constitution of the state, and it is not necessary to specify numerous reasons why and what provision it violates. It becomes necessary then for him to protect himself and if he ac-

cepts the tax, even though the protest is verbal, he does it knowing that he is liable to have to pay it back.

Commencing again with the case of the *Arkansas Building & Loan Association v. Madden*, *supra*, which in effect held that a bill would not lie to enjoin these taxes, but there was a legal remedy in that case which involved practically the laws in force in Texas up to the laws of 1905, this court caused the bill to be dismissed without prejudice, because there was no showing that an action at law would not lie, thereby leaving the company in the position of having to pay the tax under protest or forfeiture and sue and recover them back. Then follows a long list of cases on this subject.

The case of *Erskine v. Van Arsdale*, 15 Wall. 75, was a suit brought by Van Arsdale against Erskine, a collector of internal revenue, to recover back certain taxes paid him after March 2, 1867, on thimble skeins and pipe-boxes, made of iron, which was claimed were exempt, the court saying that taxes illegally assessed and paid may always be recovered back, if the collector understands from the payer that the taxes are regarded as illegal and that suit will be instituted to recover them, and that the party paying the taxes may not only recover the taxes, but interest.

The case of *State v. Nelson*, 42 N. W. Rep. 548 (Minn.), was a suit for a writ of mandamus to compel the county treasurer to certify the payment of certain taxes in order that a deed might be recorded. In that case, the court held that while mandamus would not lie against the collector, yet a suit would

lie against the collector to recover the taxes which he demanded, if illegal; after citing a large number of cases, the court say:

“Nor is it necessary, in order to constitute compulsory, as distinguished from a voluntary payment, that the unlawful demand be made by an officer who is prepared to enforce it by process. There may be that kind and degree of necessity or coercion which justifies and virtually requires payment to be made of the illegal demands of a private person who has it in his power to seriously prejudice the property rights of another, and to impose upon the latter the risk of suffering great loss, if the demand be not complied with.”

Again, referring to the case of *City of Marshall v. Snediker*, 25 Texas 460, they say:

“An ordinance subjecting one to the risk of a penalty of \$25 a day for selling liquor without a license was deemed to give to the payment of an illegal license fee the character of a compulsory payment.”

The case of *Scottish Union & National Ins. Co. v. Heriott*, 80 N. W. Rep. 666 (Iowa), was an action at law to recover taxes paid to the state treasurer. In his capacity as state treasurer he filed a demurrer to the petition, which was sustained, the court saying:

“It is insisted that the action against the state treasurer is practically an action against the state, and that, under familiar principles, it cannot be maintained. *In re Tyler*, 149 U. S. 164; 13 Sup. Ct. 785, seems to establish the rule by which to determine this question. There we find this language: ‘Where a suit is brought against defendants who claim to act as officers

of a state, and under color of an unconstitutional statute, commit acts of wrong and injury to the property of plaintiff, to recover money or property in their hands unlawfully taken by them in behalf of the state, or for compensation for damages, or in a proper case for an injunction to prevent such wrong or injury, or for a mandamus in a like case to enforce the performance of a plain, legal duty, purely ministerial, such suit is not, within the meaning of the amendment, an action against the state.' Again, in the *Virginia Coupon* case, 114 U. S. 288; 5 Sup. Ct. 903, 962, that court held, in effect, that when a defendant, sued as a wrongdoer, seeks to justify by the authority of the state, he is bound to establish that the law under which he assumes to act is a valid law; that, if the law under which he justified is unconstitutional, it is, in effect, no law, and that he then stands stripped of his official character, and must answer personally for the invasion of plaintiff's rights.' In *Smyth v. Ames*, 169 U. S. 466; 18 Sup. Ct. 418, we also find this pertinent language: 'Within the meaning of the eleventh amendment of the constitution, the suits are not against the state, but against certain individuals charged with the administration of a state enactment, which, it is alleged cannot be enforced without violating the constitutional rights of the plaintiffs. It is the settled doctrine of this court that a suit against individuals for the purpose of preventing them, as officers of a state, from enforcing an unconstitutional enactment, to the injury of the rights of the plaintiff, is not a suit against the state, within the meaning of the amendment. *Pennoyer v. McConnaughy*, 140 U. S. 1, 10, 11 Sup. Ct. 699; *In re Tyler*, 149 U. S. 164, 190, 13 Sup. Ct. 785; *Scot v. Donald*, 165 U. S. 58, 68, 17 Sup. Ct. 265; *Tindal v. Wesley*, 167 U. S. 204, 220, 17 Sup. Ct. 770.' See, also, *In re Ayers*, 123 U. S. 443, 8 Sup. St. 164. Much more might be quoted from the cases al-

ready cited in support of the rule so clearly announced. *The attorney-general contends that no wrong is charged upon the treasurer. The record discloses that the money was paid under threats from the auditor that he would enforce the collection of the tax, and revoke plaintiff's permission to do business in the state; and that it notified the treasurer, when it paid the money, that it did so under duress, and protested against paying the same; and that Herriott, as treasurer, collected and received said taxes without authority of law. True, there is no statement that defendant did any other wrong than to collect and receive the money, but it is averred that he had no authority of law either to collect or receive the same, and that he had notice and knowledge that plaintiff was paying the same under duress, and that the payment was not voluntary. If defendant were an individual receiving money obtained with his knowledge, through duress, and paid under protest, there would be no doubt of plaintiff's right to recover it back. The mere fact that he is the treasurer of the state, acting under authority of law, will not relieve him of it, should it turn out that the law is unconstitutional, and therefore no law. We think an action will lie against the treasurer for money collected and received by him, provided it be established that the law under which he assumes to act is entirely invalid. That he may have placed the money to the credit of the state, and with other funds belonging to it, is no defense, unless he was authorized to do so under a valid law. Had he collected money wrongfully from an individual, without color of authority, we apprehend it would be no defense for him to say that he acted as treasurer, or that he had turned the money over to the state. Again, it is said that the money was paid voluntarily, and cannot be recovered back. The petition recites, in substance, that plaintiff had large property interests in the state, which it*

was in duty bound to preserve and protect, and that the letter from the auditor of state made it impossible for plaintiff to continue its business, or to protect its property, without paying the tax. *At the time of the payment, plaintiff filed with both the treasurer and the auditor a written protest, in which it claimed that the tax was unconstitutional and invalid, and that by so paying it did not acknowledge its liability to pay the tax, or waive any of its rights to contest the same. Plaintiff was bound to submit to the exaction or discontinue its business. Under such a state of facts it is clear that plaintiff's act was not voluntary, and that it may recover back the amount paid, provided it has established its claim that the act in question is unconstitutional. Swift Co. v. U. S., 111 U. S. 23, 4 Sup. Ct. 244; Cunningham v. Munroe, 15 Gray 471; Carew v. Rutherford, 106 Mass. 1; Beckwith v. Frisbie, 32 Vt. 559; Shelton v. Platt, 139 U. S. 594, 11 Sup. Ct. 646; and cases cited in State v. Nelson (Minn.), 4 Lawy. Rep. Ann. 300 (s. c. 42 N. W. 548)."*

The case of *City of Denver v. Evans*, 84 Pac. Rep. 65, was a suit brought by Evans against the City of Denver to recover taxes paid to the city treasurer. The taxes were paid under protest, and with notice to the treasurer of the illegality of the tax, and it was held that the taxes could be recovered back.

*Rumford Chemical Works v. Ray, Town Treasurer*, 33 Atl. Rep. 443; 34 Atl. Rep. 814, was a suit brought by the Rumford Chemical Works, which was a manufacturing corporation and whose capital was divided into shares held by stockholders, to recover back certain taxes because it is represented only by the capital of the corporation which was not subject to the tax against the corporation, but only as

against the stockholders of the corporation. The action was sustained and the complainant was granted a recovery. It was contended that the plaintiff was not entitled to recover because the payment is to be deemed a voluntary payment, since it was made with a full knowledge of the facts rendered it illegal and without any immediate or urgent necessity, no proceeding having been taken by the collector for the collection of the tax, and notice having been given by him that he would take no such proceedings until after June 1, 1895; that the fact that the payment was accompanied by a protest did not render it any the less a voluntary payment. The court say:

“When he gives notice by his protest that he does not waive his right, but intends to insist upon it, such implication is negatived.”

Again:

“The defendant also makes the point that the protest is not sufficient because it does not specify the alleged illegality, and supports it by reference to a criticism in passing by the court upon a similar protest in *Railroad Co. v. Commissioners*, 98 U. S. 541. We see no reason for requiring a specification in the protest of the alleged illegality. All the facts connected with the assessment are certainly as fully known to the assessors as to the taxpayer, and they are in as good a position as he is to know whether the tax is legal or illegal.”

The *Boston & Sandwich Glass Co. v. City of Boston*, 45 Mass. 181, was a suit to recover taxes paid under protest. The court granted them a judgment for illegal taxes paid within six years, with inter-

est thereon from the time of the demand of the payment, the tax being held to be illegal and not warranted by the statute.

The case of *Dunnell Mfg. Co. v. Newell, Town Treasurer*, 2 Atl. Rep. 766, was a suit brought to recover illegal taxes paid under protest. In Rhode Island, the law was that corporations should be taxed only upon the real estate; that the personal estate held by it was represented by the shares of stock held by the individual stockholders except certain personal property specified in the statute, and that a general assessment on other personal property not specified in the statute, was illegal. The court awarded a judgment for the tax under protest.

The case of *Creamer v. Inhabitants of Bremen*, 40 Atl. Rep. (Maine), 555, was an action by Creamer against the inhabitants of Bremen to recover money paid for a tax claimed to have been illegally levied and to have been paid under protest. It was held that the plaintiff might recover. This was a tax levied upon certain wood cut by the defendant in one township and stored on the dock or wharf in the township where it was assessed; that an action at law is the proper remedy to recover such taxes. The court say:

“In an action for the recovery of money paid for taxes illegally assessed, the law is more liberal, as to what constitutes duress, than in other cases. The collector holds a warrant by which he is authorized to take the body or seize the property of the person against whom a tax has been assessed. Such person has had no opportunity to test the validity of the assessment against him. He has not had his day in court.

In such a case he need not wait until his goods have been actually seized, or his person arrested; but, for the purpose of preventing either, he may pay the amount demanded in such a way as to recover it, if after judicial investigation, it should be decided that the tax was illegally assessed."

The case of *Woodmere Cemetery Assn. v. Springwells Township*, 90 N. W. Rep. 277 (Mich.), was an action to recover taxes paid under protest. The tax was paid under a threat of levy, that the protest need not state the grounds of invalidity and that if it did, the party paying under such circumstances, would not be limited by the grounds in the protest. It is also urged that plaintiff should have applied to the board of review to correct the assessment, but, having failed, he is not estopped to contest the validity of the assessment and the property is not subject to taxation.

The case of *Gaar-Scott & Co. v. Sorum*, 90 N. W. Rep. 801 (Supreme Court, North Dakota), was where an attempt was made to collect taxes on personal property not in the state at the time of the taxing period, namely April 1. The action was brought against the sheriff. The taxes were paid under protest and it was held that the facts stated in the petition authorized a recovery.

The case of the *County of La Salle v. William Simmons*, 4 Gilman, 10 Ill. 513, was an action brought against the county to recover an excessive license fee. The county commissioners gave notice that they would grant a ferry license to the person who would donate the largest sum to the county, and

several offers being made, the person who had previously kept the ferry, and was an applicant for a license to continue the same, finally offered \$500, which offer was accepted by the commissioners and the money paid, and in a suit to recover it back was allowed a judgment for \$500 and \$292.50 interest. The court say :

“The principal question in the case is, whether the money thus obtained by the county can be recovered back by the plaintiff. If the payment is to be considered as voluntarily made, it is very clear that he cannot recover back the money; but if it is to be regarded in the light of a compulsory payment, it is equally clear that he is entitled to recover. The laws in force when this transaction took place authorize the county commissioners to grant licenses for ferries, whenever considered necessary by them, and to impose an annual tax on each ferry not exceeding one hundred dollars. Rev. Stat. 1833, page 303. The law vested them with a sound discretion as to whether a ferry should be established and as to whom the license should be granted unless the owner of the shores of the stream claimed the license; but it gave them no discretion as to the sum to be paid for the franchise further than to fix the amount of the annual assessment. \* \* \* They had no right to annex conditions or impose restrictions not prescribed by the statute. In this case, they decided to establish the ferry, but chose only to grant the license to the person that would pay the largest amount of money for the franchise in addition to the tax which they might legally impose. In other words, the privilege of ferriage was put up at public auction to the highest bidder. The law conferred no such power on the commissioners. In the granting of licenses, they were bound to keep

within the provisions of the statute conferring the power, and regulating its exercise. What was the condition of the plaintiff and what effect did this unauthorized arrangement of the commissioners have upon him? He had been keeping a ferry and was anxious to secure a continuance of the privilege; but instead of being permitted to have it by complying with the requisitions of the statute, and submitting to pay the highest tax which could be assessed on the franchise, he was compelled by the force of circumstances, over which he had no control, to advance a large sum of money in order to obtain the license. The illegal conduct of the commissioners put the plaintiff in their power; and taking advantage of his peculiar situation, they obtained money from him to which the county had not the shadow of right. The money was unlawfully and wrongfully obtained, and cannot in equity and good conscience be retained by the county. The fact that the commissioners chose to call it a donation does not change the real character of the transaction. It was merely a device to obtain money which the county had not the slightest right to demand. The money was exacted from the plaintiff under circumstances that strip the transaction of all the features of a voluntary payment. It was in law and fact a compulsory payment, as much so as the payment of usurious interest, which the lender exacts from the borrower; or the payment of illegal charges, which an officer demands as the condition of the performance of official services."

The case of *Harvey & Boyd v. Board of Trustees*, 42 Ill. 336, was a suit in assumpsit brought by the appellants against the president and trustees of the Town of Olney, to recover back the sum of \$600, which the plaintiffs paid to the town, as they allege,

under compulsion. It appears the town passed an ordinance requiring any person exercising the business of a substitute broker or recruiting agent in said town, to pay to the treasurer of the corporation the sum of \$600, on the payment of which sum a license was to issue authorizing the person paying the same to carry on said business for the term of three months. The ordinance further provided that any person engaged in said business without a license should be fined \$100 and be imprisoned one hundred days for each day in which he should prosecute said business. The court say:

“It would be a reproach to our law, if these municipal corporations should be permitted to assume the right to pass ordinances threatening persons with heavy fines, and a long imprisonment for carrying on a lawful business, and, after extorting a large sum of money for a pretended license by threats of prosecution, be allowed to come into court and resist repayment by saying, ‘Although we did this thing, we had no right to do it, and the ordinance that we pretended was a law was really no law, and these persons should have known better than to have paid us the money.’”

The case of *Prickett v. Madison County*, 14 Ill. App. 454, was a suit to recover \$2,000 from the county, being the amount of bonds turned over to the county for exchange. The court say:

“It is the law that where one with a full knowledge of the facts makes a voluntary payment of money without coercion, and being under no duress, he cannot afterwards recover it even though he may have paid under a mistake of law as to his rights in the premises. But where the payment is made under a mis-

take of material facts, which, if known, would have induced a different action, or under duress or coercion, the rule is otherwise."

The case of *City of Chicago v. Sperbeck*, 69 Ill. App. 562, was a suit brought to recover moneys paid for an annual license fee required by the City of Chicago, to be paid for keeping an intelligence office. The suit was to recover the sums paid for keeping an intelligence office from '88 to '92. It is not claimed that they were paid under protest. The ordinance, however, was held to be invalid. The court sustained the recovery.

In *Robertson v. Frank Brothers Company*, 132 U. S. 17, suit was brought by Frank Brothers against the collector of customs to recover money paid to avoid an onerous penalty. The amount demanded by the collector was excessive and illegal. The court held that the imposition of the penalty is sufficient to make the payment an involuntary one, and said:

"The fact that the importer was not able to get possession of his goods without making the payment complained of, was referred to by the court as an important circumstance; but it was not stated to be an indispensable circumstance. \* \* \* But the circumstances of the case are always to be taken into consideration. When duress has been exerted by one clothed with official authority, or exercising a public employment, less evidence of compulsion or pressure is required."

The case of *City of Chicago v. Klinkert*, 94 Ill. App. 524, was a suit in assumpsit brought to recover amounts paid for brewery licenses under an ordinance which was held to be invalid. While it

was admitted that the ordinance was invalid, it was contended that the payments were voluntary and hence could not be recovered back. The payments were made under a threat of the collector that unless the license fee was paid, the agent of the company would be arrested. It was held that the money could be recovered back; that the compulsion which would render a payment of taxes involuntary, must in general, consist of some action or threatened exercise of power possessed or believed to be possessed by the person exacting or receiving the payment over the person or property of the other and from which he had no reasonable means of immediate relief except by making payment, and that a recovery of money paid as illegal taxes or license fees may be had under the common counts as for money had and received. To same effect is the case of *City of Chicago v. Waukesha Brewing Co.*, 97 Ill. App. 585 and *Henry v. ———*, 15 Vt. 460.

*Chicago & Alton R. R. Co. v. Chicago Vermillion & Wilmington Coal Co.*, 79 Ill. 121, was a suit to recover money paid for freight transportation by the coal company. It had a contract with the assignor of the railroad company. The point in the case is that the coal company had no other outlet for its coal than over the road of the railroad company. The point announced by the case is:

“It is claimed appellees paid the additional charge of six dollars per car voluntarily, and cannot recover it back under this count. The action is brought on the agreement of April, 1869, on the theory that thereby a contract exists between these parties as successors of the original contracting parties, and we recognize

this theory as correct. It can hardly be said these enhanced charges were voluntarily paid by appellees. It was a case of 'life or death' with them, as they had no other means of conveying their coals to the markets offered by the Illinois Central and were bound to accede to any terms appellants might impose. They were under a sort of moral duress by submitting to which appellants have received money from them which, in equity, and good conscience, they ought not to retain."

The case of *German Alliance Insurance Company v. Van Cleave et al.*, 191 Ill. 410, was a suit brought in equity by a large number of insurance companies to enjoin Van Cleave as insurance superintendent from paying over certain taxes to the state treasurer and from collecting the same in the future; to enjoin the state treasurer from collecting the tax; to recover from the insurance superintendent, certain taxes which had been paid; the real contention being that the superintendent claimed a tax of 2 per cent on all premiums specified in the policies written by the insurance companies. The insurance companies on the other hand claimed that he was only entitled to 2 per cent on the moneys actually received by them for premiums earned during the year and was not entitled to 2 per cent on cancelled policies or unearned premiums. The moneys were paid under protest. The bill was dismissed by the lower court on demurrer. The Supreme Court reversed the case. Two points are to be noticed. First, the fact that the money collected by the insurance superintendent as taxes eventually becomes the property of the state does not preclude

a suit against him to compel him to refund such taxes, which were paid under protest, and to enjoin him from paying the same to the state treasurer and the latter from receiving them. The court say:

“A suit against him is not different, in any respect, from a suit against any other collector of taxes, and a party is not precluded from questioning the unauthorized act of a tax collector or other officer merely because the money collected will eventually reach the state.”

The second point is that the 2 per cent tax imposed by the Act of 1899 upon the “gross amount of premiums received” for business done in this state by foreign insurance companies other than life, does not apply to unearned premiums actually refunded upon cancelled policies.

The case of *Swift & Company v. United States*, 111 U. S. 22, was a suit brought by Swift & Co., in the Court of Claims to recover a large amount of money paid by Swift & Co., who were manufacturers of matches, furnished their own dies and gave bonds for payment of stamps furnished within sixty days after delivery, being entitled to a discount of ten per cent. It appeared that the company had settled their accounts repeatedly with the commissioner of internal revenue; that they had accepted coupons in payment of their commissions in lieu of money, which precluded them from recovering. There are three points in the case, first, whether the former construction of the statute was correct; second, whether the long acquiescence of the company in the construction given to the statute by the commissioner, and its frequent and regular settlement

of its accounts on that basis, an acceptance of stamps in lieu of money precluded it from disputing the legality of the transactions, and third, what was the effect of the failure to protest against the settlements which it made under the rulings of the commissioner. If it was held in the case that persons using their own dies were entitled to payment of commissions instead of stamps; that a payment illegally exacted is not such a voluntary payment as will preclude the party from recovering; that because there were repeated settlements as insisted upon by the revenue collector, was not a bar to the right of plaintiff's recovery; that the only alternative was to submit to the illegal exaction or discontinue the business; that the fact that the accounts were made and balanced monthly did not bar a right of recovery and that it was limited to the amount paid within six years.

The case of *City of Marshall v. Snediker*, 25 Texas, 460, was a suit brought to recover from the city \$500 paid by Snediker & Cole to the city as a corporation tax imposed upon retailers of spiritous liquors. It was alleged that the tax was out of proportion to the taxes imposed on other occupations and citizens of the city. The tax was paid under threat of levy. Plaintiff was allowed to recover and the Supreme Court sustained the recovery. The question was raised whether the payment was voluntarily made or not, the court saying:

“It was collected off of the defendants under color of lawful authority, in pursuance to an ordinance of the city council; which enjoined its payment under a penalty of twenty-five dol-

lars a day for every day its violation was continued by retailing spiritous liquors. The act of incorporation gave to the city assessor the same remedies for the collection of taxes imposed by the city as the assessor of each county has for the collection of state or county tax. This subjected the defendant's property to seizure and sale in a summary manner by the assessor. Under these circumstances, the parties are not on equal terms. \* \* \* If, also, the city council exceeded its authority in making this assessment of tax, and demanded and received from the defendants more than the charter permitted, and it was paid under the pressure of the summary remedies prescribed for its collection, and of the heavy penalty for retailing without its payment, it was against good conscience to retain it."

The case of *Baker & Co. v. Panola County*, 30 Texas, 86, was an action brought by Baker & Company to recover the sum of \$280 paid by them to the county as a license tax for retailing liquor. The complaint was demurred to and the demurrer sustained. The cause was reversed and remanded. The question whether the payment was voluntarily made or not, was also raised in this case. The case of *City of Marshall v. Snediker*, followed.

*Wood v. Stirman*, 37 Texas, 585, was a suit commenced by Wood against Stirman as county treasurer of Kaufman county, to recover back \$150 collected as an occupation tax for the sale of liquor. The defendant excepted to plaintiff's petition and it was held that when the county treasurer collects his taxes without authority of law, he alone is responsible therefor, and that an action can be maintained for the money so collected, even though the

money be paid into the treasury and disbursed as other funds.

The case of *City of Galveston v. Snyder*, 39 Texas, 236, was a suit brought to recover back several sums of money paid by Snyder to the city treasurer of Galveston as a city tax claimed to have been levied against the appellee on goods, wares and merchandise bought or received for sale by the appellant. The tax was resisted on the ground that it was a discriminating tax, not an *ad valorem* tax and that the tax the corporation had a right to be assessed was an *ad valorem* tax. Judgment was rendered for the plaintiff and affirmed by the Supreme Court.

The case of *Galveston Gas Co. v. County of Galveston*, 54 Texas, 287, was a suit brought by the Gas Company to recover back certain taxes paid under protest. The Supreme Court say on page 292:

"We are further of opinion, that the taxes having been paid under protest to prevent the sale and consequent cloud on the title, the payment was so far compulsory as to allow of a recovery back, if sought with reasonable promptness."

Referring to the cases cited above, they further say:

"These cases recognize that a payment may be compulsory, although not made to relieve the person or goods from seizure or detention, actual or threatened, if made under circumstances creating a moral pressure of 'equal influence in perverting the free will.' Where made to avoid the danger of a heavy penalty,

which, however, could only have been enforced by a criminal prosecution, in which the party would have had his opportunity to set up the illegality of the tax as a defense, the recovery back was allowed. On the same principle, we think that the plaintiff here was not compelled to risk the heavy loss which might have resulted from the sale, although his possession could only have been disturbed by a suit, in which he would have had his day in court. The moral pressure was sufficiently great, the necessity sufficiently immediate and urgent, to remove the payment, made under protest, from the class of voluntary payments."

See, also, *Galveston County v. Gorham*, 49 Texas, 279.

In the case of *Galveston County v. Galveston Gas Company*, 72 Texas, 509; 10 S. W. Rep. 583, suit was brought to recover taxes paid under protest and also the interest on such taxes, on the ground that the assessment was void. The assessment was what was known as a supplemental assessment made by the county assessor under the direction of the controller on property not assessed. The taxes were paid under protest; suit was brought to recover them back; judgment rendered for the Gas Company, but excluded the interest. The case was reversed in the Supreme Court, interest added and judgment rendered there.

The foregoing authorities sustain, not only the proposition that a suit can be brought against a taxing officer to recover back taxes, paid under protest, duress or compulsion, but they are also very conclusive that an action at law is the proper remedy.

A tax paid under protest is, where at the time of the payment of the taxes, the party paying the taxes pays the same and notifies the collector of the tax that he will seek to recover the same from the taxing officer. In such instances it is clear that the taxing officer has to protect himself, and any act of the taxing officer, as would seem by the foregoing authorities, after he had received such notice, cannot change his liability toward the party paying the same.

In this case it appears, and the demurrer so admits, that the taxing officer (the defendant) who was the party collecting the taxes, received the taxes under protest; that the tax was in violation of the Constitution of the State of Texas also of the Constitution of the United States, and it is therefore void, and plaintiff reserved the right to recover back the amount of the taxes he had paid in the event it shall be decided that the law is unconstitutional, so it is clear that there can be no question of protest.

The payment cannot be considered voluntary. There was no other remedy, unless it be in a court of equity to enjoin the collection and attempted forfeiture and imposition of the additional penalty, and, as we have said heretofore, that cannot be done, and as was held in the case of *Missouri, Kansas & Texas Railway Co. v. Shannon*, 100 S. W. Rep. 138, that Shannon was an officer who might be sued. In this case, without some remedy by an action to recover under notice of protest, the defendant could practically confiscate the property of the plaintiff or use his power to perform such acts as gave to the citi-

zens of the state who had purchased from the plaintiff goods to take those goods and confiscate them without any right to recover therefor; in other words, the plaintiff would be remedyless. That is why we do not admit that the Secretary of State had power to add the penalty or impose the forfeiture; still the fact remains that he, being authorized under the act to make public the fact that any corporation had not paid its taxes, no matter what defense it might have had to the tax, and to make public the fact that he had marked the word "forfeited" upon his records in the office, gives to debtors of the plaintiff a club by which such debtors may harass and annoy the plaintiff.

The fact, also, that the defendant under the act in question could add a penalty of 25 per cent gives him a judicial power not intended by the Constitution of the State, which we will discuss hereafter, and to avoid the payment or liability of payment of such additional penalty shows that the payment was not voluntary.

Under the demurrer in this case the only argument that the defendant can make to avoid the recovery, under the facts admitted by the defendant, is that the payment was voluntary, free from duress or compulsion, and without protest. The demurrer admits the protest, admits that it was not voluntary, admits that a penalty was about to be imposed, admits that the Secretary of State would declare the forfeiture no matter whether the tax was legal or illegal, and for the purposes of this hearing there is no question of protest, or that the tax was paid under

compulsion or duress, therefore without any doubt the payment of the tax in this case must be considered involuntary, and the demurrer should have been overruled.

And it appears from the cases heretofore referred to, commencing with the case of *Erskine v. Van Arsdale*, 15 Wall. 75, that if the collector understands from the payer that the taxes are regarded as illegal and suit will be instituted to recover them back, that the party may not only recover them back, but the interest.

And we find, running through all these cases, that the payer need not specify any particular clause of the constitution or any particular reason why they are paid under protest so long as he notifies the officer that he claims them to be illegal and that he purposes to seek redress for the taxes.

In this class of cases, as it will be seen by the authorities thus cited from this court and from various courts, that a self-executing law which does not give to the tax payer any right of redress before the taxing body by which he may be heard and excused, but where the taxing authorities are persons exercising the authority of assessing and collecting the tax acts under a self-executing law and a person's property may be taken or rights forfeited or interests jeopardized by reason of some act of such body, then it is reasonable for the tax payer to seek redress in the courts either by paying the tax and seeking to recover it back, or if it involves a multiplicity of suits or for some cause which equity will recognize, then to seek an action in

equity. In this case if the tax payer did not make its report and pay the tax the law became self-executing in adding unreasonable penalties without notice, a compulsion existed. The tax payer's rights were jeopardized, its property was taken, additional burdens were imposed upon it without the right of a hearing in a court of justice in the ordinary course of procedure. In such a case and under such a protest the payment cannot be considered voluntary. Shannon was the officer of the state; he was the Secretary of the State; he was the officer designated in the law to compute the tax and collect it. The protest was given to him at the time of the payment. It became his duty to protect himself. If he did not do his duty then the state or individuals in the state indebted to plaintiff might confiscate the property of the plaintiff in error by pleading in any action that might be commenced, that the plaintiff had no standing because it had not paid its annual franchise tax based upon its whole capital and surplus, and the courts of the state would have to deny, as it has denied repeatedly, judicial rights. The law in force at the time the case of *Arkansas B. & L. Association v. Madden, supra*, was decided, a notice was required before any penalty could be added, before any forfeiture could be made.

We do not know that we can say more upon this subject than it has been recognized by this court, by the courts of many states, by the courts of Texas that the payment of taxes under protest where the taxes were illegal, based upon an illegal statute are illegal in the inception and can be recovered back.

If the taxes were legal but excessive, a different question would then be presented, but here is a tax illegal as to all foreign corporations, also as to all domestic corporations, and on the theory of the *Union Refrigerator Transit Co. v. Kentucky*, it cannot possibly be legal as to corporations of Texas who have a large portion of their property outside of the state, because it attempts to tax that which is not only within the state, but that which is in every other state in the Union, and not only that which is within the Union, but that which may be invested in foreign countries and in foreign lands. Just because it is a corporation no matter where its property may be located, if a mere fraction of that property is domiciled within the state and a sale of part of its goods takes place in the state, it must pay taxes on the entire capital and surplus, no matter where their entire capital and surplus is located, is not supported by any law. Can there be any question but that this law violates the commerce clause of the constitution; the clause of the constitution impairing the obligation of contracts; the 14th amendment of the constitution in that it takes property without due process of law and in that provision of the constitution that it denies the citizens of the United States the equal protection of the law. It seems as though there could be none.

This case must be reversed.

Respectfully submitted,

C. E. MORE,

*Attorney for Plaintiff in Error.*

ALMON W. BULKLEY,

J. L. PATTERSON,

*Of Counsel.*

(21,751)

# IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1911.

No. 88.

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GAAR-SCOTT & COMPANY, PLAINTIFF IN ERROR.

vs.

O. K. SHANNON, DEFENDANT IN ERROR.

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BRIEF FOR DEFENDANT IN ERROR.

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The Plaintiff in Error instituted this suit against Defendant in Error to recover the sum of \$575.00 with interest thereon, \$287.00 of which was alleged to have been paid by it to him as Secretary of State of the State of Texas on or about the 28th day of April, 1905, and \$288.00 of which was paid to him as Secretary of State on April 30, 1906, which said amounts were paid as a franchise tax claimed to be due from it to the State of Texas by virtue of Acts of the Twenty-ninth Legislature, 1905, pages 21, 100, Chapters 19, 72, for said years.

The suit was predicated on the contention that said Acts of the Legislature under which the tax was collected were and are unconstitutional and void. The petition, after all formal requisites were stated, alleged substantially that the State of Texas in 1901 granted to it a permit, under the then existing law, to transact business within the State for a period of ten years, and that it paid the franchise tax then imposed for said privilege; that thereafter in the years 1905 and 1906 the Secretary of State by virtue of the Acts of the Twenty-ninth Legislature above mentioned demanded and received from Plaintiff in Error the amounts sued for as franchise tax for said years; that said tax was so paid by it under written protest on the ground that said law was unconstitutional and void, but the points relied upon were not set forth in said protest. The petition, however, and the assignments of error in the Court asserts the invalidity of said law chiefly upon the following grounds, viz.:

First. That having <sup>been</sup> granted a permit under the laws of 1901 for a period of ten years and having paid the tax therefor, the Legislature had no authority by a subsequent act to impose an additional tax and to do so would be violative of the provisions of both the State and Federal Constitutions, forbidding the passage of any law impairing the obligation of contracts.

Second. That it was an Indiana corporation doing wholly an interstate business and was therefore not subject to the payment of the franchise tax in question and was not required to obtain a permit to transact business in the State of Texas and to demand the same would be in violation of law.

Third. That the said laws imposed a greater burden upon foreign than upon domestic corporations and were

therefore an unjust discrimination as against it in favor of domestic corporations.

Fourth. That that part of the Statute which empowered the Secretary of State to adjudge and declare forfeitures of permits of foreign corporations was in violation of Section 1 of the Fourteenth Amendment of the Constitution of the United States, which provides that no State shall deprive any person of life, liberty or property without due process of law.

A general demurrer to the petition being sustained by the trial court, Plaintiff in Error appealed to the Court of Civil Appeals for the Third Supreme Judicial District of Texas, which court affirmed the judgment of the trial court. A writ of error to the Supreme Court of Texas being refused, the cause is now before this Court upon writ of error to the Court of Civil Appeals for the Fourth Supreme Judicial District of Texas.

We shall treat the assignments of error in the order in which they have been stated .

#### FIRST.

*The prohibition in the Constitution of the United States against State laws impairing the obligation of contracts does not prevent a State if it has merely licensed or permitted a foreign corporation to do business within its limits from either revoking the license and excluding the corporation altogether or imposing new conditions or restrictions upon its right to continue business, for the mere license is not a contract between the State and the corporation within the meaning of the Constitution.*

By its first assignment of error Plaintiff in Error in-

sists that said Acts of the Legislature of Texas impaired the obligations of the contract entered into between it and the State of Texas on the 23d day of May, 1901. The Act of the Legislature under consideration provided for the payment by every foreign corporation theretofore authorized or thereafter authorized to do business in the State of Texas of a certain franchise tax based upon the authorized capital stock of such corporation, providing for the time of its payment and prescribing a penalty of 25 per cent upon the amount of the taxes due for failure to pay the same, as well as forfeiture of right to do business in the State and directing the Secretary of State to declare such forfeiture without judicial ascertainment by entering the same upon a ledger to be kept in his office relating to such corporations. (Section 1, Chapter 19, pages 21-23, Acts Twenty-ninth Legislature of Texas, 1905.) And by an amendment thereto, Section 1, Chapter 72, page 100, Acts Twenty-ninth Legislature, 1905, it was further provided that it should be a misdemeanor on the part of the officers of said corporations, subject to the payment of such franchise tax, to fail to give under oath accurate information as to the amount of its capital stock, when demanded by said Secretary of State. There was a somewhat similar provision in the Revised Statutes of Texas in force in 1901 (Rev. Stat. 1895, Article 5243i) relative to the right of granting permits to foreign corporations to do business within the State of Texas, but the amount of such tax was increased by the Acts of the Twenty-ninth Legislature. (Laws 1905, page 22, Chap. 19, Sec. 1.)

The proposition stated at the beginning of the discussion of this point is, we think, amply sustained by the decision of this Court and of other courts. Plaintiff in Error confidently relies upon the case of American

Smelting Co. vs. Colorado, 204 U. S. 103, as an authority for its claim that the Acts of the Legislature of 1905, increasing the amount of the franchise tax to be paid by foreign corporations is as applied to it in violation of the Constitution of the United States, which denies the State the right to pass any law impairing the obligation of contracts, but a careful examination of that case will disclose that it does not in any sense support the claim. The American Smelting Company was a corporation created under the laws of New Jersey on April 4, 1899, and on April 28, 1899, it made application to the proper State authorities of Colorado for permission to enter and transact business in that State under the laws thereof. At that time its capital stock was \$65,000,000, but subsequently it was increased to \$100,000,000 and the certificate of such increase was duly filed in Colorado. Section 499, Mills Annotated Statutes of Colorado, which was in force at the time said company made application for permission to transact business in Colorado, after making provision for the performance of certain conditions by a foreign corporation entering the State, continued: "and such corporation shall be subjected to all the liabilities, restrictions and duties which are or may be imposed upon corporations of like character organized under the general laws of this State, and shall have no other or greater powers." Section 500 of the same statute provided that a foreign corporation should be required to file in the office of the Secretary of State a copy of its charter, or, if incorporated under a general corporation law, a copy of such certificate of incorporation. Section 1 of Chapter 51, of the session laws of Colorado for 1897 provided that every corporation should pay to the Secretary of State, for the use of the State, a fee of \$10 if the capital stock did not exceed \$50,000.

If in excess of that sum the corporation was to pay the further sum of fifteen cents on each and every thousand dollars of such excess, and a like fee of fifteen cents on each thousand of the amount of each subsequent increase of stock. By Section 10 of Chapter 52 of the session laws of Colorado for 1901 it was provided that no foreign corporation could "exercise any corporate powers or acquire or hold any real or personal property, or any franchises, rights or privileges, or do any business or prosecute or defend in any suit, in this State until it shall have received from the Secretary of this State a certificate setting forth that full payment has been made by such corporation \* \* \* of all fees and taxes prescribed by law to be paid to the Secretary of State, and every such corporation shall pay to the Secretary of State for each such certificate a fee of \$5.00."

It appears that in accordance with the provisions of Section 1 of the Laws of 1897, above mentioned, the corporation paid, upon filing its certificate, April 28, 1899, to the Secretary of State for the use of the State \$9,792.50 on its original capitalization; and on May 17, 1901, the further sum of \$5250.00 upon its increase of capital stock of \$100,000,000. That thereupon the Secretary of State issued a certificate stating the filing of the proper papers with him, and further stating that "pursuant to the provisions of Section 10 of said Act (1901), I hereby certify that the said company has made full payment of all fees prescribed by law to be paid to the Secretary of State and due at the time of the issuing of this certificate, and is hereby authorized to exercise any corporate powers provided for by law." This was given under the hand and official seal of the Secretary of State and was dated on the 21st day of May, 1901. There were at this time no other statutes providing for

the payment of any charges, fees or taxes for coming into and doing business in the State of Colorado.

The corporation, upon entering the State in 1899, under its permission to enter and transact business therein, immediately commenced to erect a plant for the purpose of carrying on its business as a corporation, and before the commencement of the suit in that case had invested for that purpose in the State sums amounting to more than five million dollars. At the time the corporation was permitted to enter and carry on its business in the State the statute of Colorado provided that the term of life of corporations formed under the laws of that State should be twenty years. After the corporation had been doing business for some three years, and on March 22, 1902, the Legislature of Colorado passed an Act in relation to taxes. Section 64 of that Act provided that all domestic corporations should thereafter and on or before the first day of May of each year, or at the time of obtaining their charter or certificate of incorporation pay "an annual State corporation license tax," to the auditor of the State, of two cents upon each thousand dollars of its capital stock. Section 65 provided that every foreign corporation which had therefore obtained "the right and privilege to transact and carry on business within the limits of the State of Colorado shall, in addition to the fees and taxes now provided for by law, and as a condition precedent to its right to do any business within the limits of this State, pay annually \* \* \* a State license tax of four cents upon each one thousand dollars of its capital stock." Section 66 provided that every corporation which should fail to pay the tax provided for in Sections 64 and 65 should forfeit its right to do business within the State until the tax was paid and should be deprived of all rights and

privileges, and that the fact of such failure might be pleaded as an absolute defense to any and all actions, suits or proceedings brought or maintained by or on behalf of such corporations, in any court of competent jurisdiction within the limits of the State, until such tax was paid. The corporation refused to pay the additional tax provided for by the statute of 1902 and the Attorney General of Colorado instituted suit for the purpose of forfeiting its right to remain in the State. The defense set up that the tax was a violation of the Federal Constitution as impairing the obligation of a contract and in other particulars named. Upon the trial the court found that there was due the State of Colorado the sum of four thousand dollars, being the amount of the annual tax due by reason of the statute which was held valid. A decree was thereupon entered forfeiting the right of the corporation to do business within the limits of the State of Colorado until the tax was paid. The case was before this Court upon writ of error to the Supreme Court of Colorado and it was held that the Act of Colorado of 1902 impaired the obligation of the contract existing between the corporation and the State and that it was therefore void as to said corporation. The court based its decision, however, upon that provision of the Colorado statute above quoted, which subjected a foreign corporation in that State to all the liabilities, restrictions and duties imposed or to be imposed upon corporations of like character organized under the laws of Colorado, and it is clear that except for that statute the holding would have been different. In the course of its opinion, this Court said:

“Having obtained permission to enter the State and do business as above mentioned the question,

aside from that of the extent of the term, is whether any contract between the State and the corporation arose under these laws and the facts above mentioned.

"In 1899, when this (foreign) corporation applied for a permit to enter and do business in the State, the laws of Colorado only granted such application on the payment of a certain fee named in the statute of 1897, which was payable upon filing its certificate of incorporation in the office of the Secretary of State of Colorado, and until that payment was made and the certificate filed no such corporation was permitted to have or exercise any corporate powers, nor was it permitted to do any business in the State. Section 30 of the Act of 1901 provided that, upon payment of all taxes, etc., due under the law, the Secretary of State was to issue a certificate acknowledging the fact, for which the corporation was to pay a stated fee; and until the certificate was received from the Secretary of State by the corporation it should not exercise any corporate powers or do any business in the State, as provided for by the Act of 1897.

"The result of these statutes was that the foreign corporation, upon filing the proper papers and paying the statutory fees and obtaining the certificate to that effect from the Secretary of State, obtained the right to enter and do business in Colorado. The Act of 1901 did not increase the amount of the exaction for entering and doing business in the State, but simply provided for a certificate, acknowledging payment, from the Secretary, and it imposed the payment of a small fee for such certificate. The right obtained was a right to enter the State and do

business therein as a corporation. It was also subject by statute to the liabilities, restrictions and duties which were or might thereafter be imposed upon domestic corporations of like character. Domestic corporations at that time had the right to a corporate existence of twenty years.

"These provisions of law, existing when the corporation applied for leave to enter the State, made the payment required and received its permit, amounted to a contract that the foreign corporation so permitted to come in the State and do business therein, while subjected to all, should not be subjected to any greater liabilities, restrictions or duties than then were or thereafter might be imposed upon domestic corporation of like character.

"A provision in a statute of this nature subjecting a foreign corporation to all the liabilities, etc., of a domestic one of like character must mean that it shall not be subject to any greater liabilities than are imposed upon such domestic corporation. The power to impose different liabilities was with the State at the outset. It could make them greater or less than in case of a domestic corporation, or it could make them the same. Having the general power to do as it pleased, when it enacted that the foreign corporations upon coming in the State should be subjected to all the liabilities of domestic corporations, it amounted to the same thing as if the statute had said the foreign corporation should be subjected to the same liabilities. In other words the liabilities, restrictions and duties imposed upon domestic corporations constitute the measure and limit of the liabilities, restrictions and duties which might thereafter be imposed upon

the corporation thus admitted to do business in this State. It was not a mere license to come in the State and do business therein upon payment of a sum named, liable to be revoked or the sum increased at the pleasure of the State, without further limitation. It was a clear contract that the liabilities, etc., should be the same as the domestic corporation, and the same treatment in that regard should be measured out to both. If it were desired to increase the liabilities of the foreign, it could only be done by increasing those of the domestic corporation at the same time and to the same extent.

"Such being the contract, how long was it to last? Only until the State chose to alter it? Or was it to last for some definite time, capable of being ascertained from the terms of the statutes as they then existed? It seems to us that the only limitation imposed is the term for which the corporation would have the right to continue in the State as a corporation. One of the restrictions as to domestic corporations is that which limits its corporate life to twenty years, unless extended as provided by law. The same restriction applies to the foreign corporation. *Iron Silver & Co. vs. Cowie*, 31 Colorado, 450. Counsel for the State concedes that the corporation was admitted for a period of twenty years, but subject to the power of the State to tax. During that time, therefore, the contract lasts. This is the only legitimate, and we think it is the necessary, implication arising from the statute.

"This is not an exemption from taxation, it is simply a limitation of the power to tax beyond the rate of taxation imposed upon a domestic corpora-

tion. Instead of such a limitation the Act of 1902, already referred to, imposes a tax or fee upon or exacts from the foreign corporation double the amount which is imposed upon or exacted from the domestic one. The latter is granted the right to continue to do business upon the annual payment of two cents upon each one thousand dollars of its capital stock, while the former must pay four cents for the same right. This can not be done while the right to remain exists. It is a violation of the obligation of an existing valid contract. *Home of the Friendless vs. Rouse*, 8 Wall 430."

The case of the Home Insurance Company vs. City Council, 93 U. S., 116, is, we think, directly in point upon the proposition involved here and fully sustains the Defendant in Error. In that case, under an Act of the Legislature of Georgia of the 19th of March, 1869, the Home Insurance Company procured the requisite authority to transact in Georgia by its agents the business of insurance for one year from the first of January, 1874, and, at the option of the company, for sixty days longer. The company thereupon established an office and agency in the city of Augusta, and thereafter transacted business at that place. A general law of the State imposed a tax of one per cent upon the gross amount of premiums received. An ordinance of the city imposed a tax of one and one-quarter per cent upon such receipts. These taxes were paid by the company without objection. On the 5th day of January, 1874, the city council passed an ordinance, which imposed, further, a license tax of \$250.00 "on each and every fire, marine or accidental insurance company, located, having an office, or doing business within the City of Augusta." A bill was

filed to enjoin the collection of this tax. The Superior Court of Richmond County sustained the validity of the tax and dismissed the bill. The Supreme Court of the State affirmed the decree. The complainant thereupon sued out a writ of error and removed the case to this Court. It was insisted that the ordinance imposing the tax in question was void, being in conflict with that provision of the Constitution of the United States which declares that "no State shall pass any law impairing the obligation of contracts." This Court fully considered the question and overruled the contention. In the opinion it is said:

"The Act of 1869, before mentioned, forbids any company to do the business of insurance in the State, without first obtaining a certificate from the Comptroller-General of the State. Before obtaining such certificate, every company is required to furnish a sworn statement, setting forth certain specified particulars. Upon being satisfied of the truth of the statement, he is required to issue the certificate. He is entitled to a fee of seven dollars and a half for examining and filing each statement, and a fee of two dollars and a half for each certificate. The fifth section declares that whatever deposits, taxes, penalties, certificates or license fees are exacted from Georgia companies in any other State, shall be exacted from the companies of such State in Georgia. It does not appear by the record that any Georgia insurance company was doing business in New York in the year 1874. This section, therefore, does not affect the case in hand. The Act contains no other allusion to the subject of taxation. It does not, therefore, circumscribe

in any degree the taxing power of the State, or of any municipality within the State clothed with such authority. It left both, in this respect, standing just where they would have stood if this Act had not been passed. It contained no stipulation, express or implied, that either should be thereby in any wise limited or restrained.

"If it were competent for the State to impose the tax of one per cent upon the gross amount of premiums received, would it not have been equally so for the State to impose a further tax, the same with that in question, and in the same way? And if it were competent for the city council to impose the tax of one and a quarter per cent upon the same receipts, why might it not impose the further burden here in question? If the State could impose the further tax, why not the municipality? Is there any sensible ground of contract prohibition upon which the claim of exemption from either can be placed? This question must necessarily be answered in the negative. We find no semblance of a contract that additional taxes should not be imposed.

"In the License Cases, 5 Wall 462, the nature of the tax exaction here in controversy was carefully considered by this Court. There the revenue laws of the United States required payment in advance to be made for permission to carry on the business of selling liquor, and of selling lottery tickets. It was provided that no license so granted, or special tax so laid, should be construed to authorize any business within a State forbidden by the laws of such State, or so as to prevent the taxation by the State of the same business.

"This Court held that the payment required was

a special tax, levied in the manner prescribed; that the penalty provided was a mode of enforcing its payment; and that the license, when issued, was only a receipt for the tax. It was held further, that, as regards the reservation of power in favor of the States, the result would have been the same if the Acts of Congress had been silent upon the subject. This was necessarily so, because the objects taxed belonged to the internal commerce of the States, and were within their police power, and the right of Congress and the State were concurrent. Congress could, therefore, no more restrict the power of a State than the State could restrict that of Congress.

“What is said there as to license taxes is applicable to the case before us. There is no difference between such a tax and those which have been paid by the plaintiff in error to the defendant in error, and to the State, without objection.

“In the ordinance in question the tax is designated ‘a license tax,’ but its payment is not made a condition precedent to the right to do business. No special penalty is prescribed for its non-payment, and no second license is required to be taken out. Had the ordinance been otherwise in these particulars, we have seen, viewing the subject in the light of the License Tax Cases, that the result would have been the same.”

The decision in the case just quoted from we think fits the case at bar exactly. It illustrates clearly the distinction between a mere license, and a statute, which amounts to a contract, and the difference between the case of *American Smelting Company vs. Colorado*, *supra*,

and the one at bar. The statutes of Texas prescribing the amount of franchise tax to be paid by foreign corporations for the privilege of doing business in Texas, and which were in force at the time Plaintiff in Error secured its permit from the Secretary of State, constitute no semblance of a contract that additional taxes should not be paid.

A license to a foreign corporation to enter a State does not involve a permanent right to remain. Subject to the laws and Constitution of the United States, full power and control over its territories, its citizens, and its business, belongs to the State, *Doyle vs. Continental Insurance Company*, 94 U. S., 535-541. And the State Legislature has power at any time to repeal or modify the Act granting such permission, having due regard to rights of property already acquired, where no contract existed. Statutes prescribing the terms upon which a foreign corporation may do business in a State reflect and execute the general policy of the State upon matters of public interest and each subsequent Legislature has equal power to legislate upon the same subject. The Legislature has power at any time to repeal or modify the act granting such permission, making proper provision when necessary in regard to the rights of property of the company already acquired. *Douglas vs. Kentucky*, 168 U. S., 488. In the case of *Waters Pierce Oil Company vs. Texas*, 177 U. S., 28, this court held that a permit or license to do business within a State is not in itself a contract inviolable against subsequent legislation by the State.

The Legislature may alter the terms or conditions of admission of foreign corporations at pleasure. *Mutual Life Insurance Co. vs. Spratley*, 172 U. S.,

602; *Doyle vs. Continental Insurance Company*, 94 U. S., 535. The same principle is found in the following cases: *Fertilizer Co. vs. Hyde Park*, 97 U. S., 659; *Butchers' Union, etc., Co. vs. Cresson City Co.*, 111 U. S., 746.

The State having the power to exclude entirely, has the power to change the condition of admission at any time for the future and to impose as a condition the payment of a new tax or a further tax as a license fee. *Ashley vs. Ryan*, 153 U. S., 436; *Philadelphia Fire Association vs. New York*, 119 U. S., 110; *Society for Savings vs. Coite*, 6 Wall., 594; *Provident Institution vs. Mass.*, 6 Wall., 611. These powers are unrestricted unless the terms of the license or admission to do business are such as to constitute a contract between the State and the corporation. *American Smelting Co. vs. Colorado*, *supra*.

In *Connecticut Mutual Life Insurance Company vs. Spratley*, *supra*, this court held that an act prescribing the terms as to appointment of agent for the service of process, etc., created no contract on acceptance by the foreign corporation, but that such act constituted a mere license given by the State which it was entirely competent to change at any time.

In case of *Postal Telegraph Cable Company vs. Charleston*, 153 U. S., 692, it was shown that the Postal Telegraph Cable Company, a corporation of the State of New Jersey, had an office in the city of Charleston and that it was engaged in sending and receiving messages by wire to and from points inside and outside the State of South Carolina; that it had its lines over the post roads, highways and railroads in the city of Charleston and in several of the

States; that the company had accepted the provisions of the Act of Congress approved July 24, 1866, Chapter 230, whereby it had put its lines at the service of the United States for postal, military and other purposes, and given precedence to its business. The general assembly of South Carolina by an Act approved December 17, 1881, authorized the city of Charleston to impose a license tax not to exceed \$500 on all persons engaged in any business, trade or profession in the city of Charleston. Under this statute the city of Charleston by an ordinance levied a tax of \$500 upon telegraph companies or agencies for business done exclusively within the city of Charleston and not including any business done for the government of the United States, its officers or agents. The Postal Telegraph Cable Company declined and failed to pay such license tax, claiming that the same was a tax upon the Telegraph Company for the privilege of exercising its franchise within the city of Charleston and not an exercise of the police power granted to the city by the State, and also that said company having constructed its lines along the post roads in the city of Charleston and elsewhere, no State or municipal authority could exact a license for the privilege of conducting its business, and also that the ordinance in question constituted an interference with the Interstate Commerce and was therefore void. All of these claims of the company were overruled by this Court, and the case of *Home Insurance Company vs. City Council*, 93 U. S., 116, was cited as an authority for the decision. In referring to that case this Court said:

“It was argued on behalf of the insurance com-

pany that, as it had complied with the provisions of the laws of Georgia which authorized foreign insurance companies to do business in that State, it was not competent for a municipal corporation of the State to impose an additional condition on the right of the company to do business. But it was held, citing the License Tax Cases, 5 Wall., 462, that the license in question must be regarded as nothing more than a tax; that the penalty provided was a mode of enforcing its payment; and that the license, when issued, was only a receipt for the tax, and not a grant of an authority to conduct business on condition of paying the license."

In *Wiggins Ferry Co. vs. East St. Louis*, 107 U. S., 365, where a ferry company, authorized by an act of assembly of the State of Illinois to carry on its business and paying State taxes prescribed in its charter, was called upon by a city ordinance to pay a license tax, it was held by this Court that the exaction of a license fee is an ordinary exercise of police power by municipal corporations, and that whether the license fee be exacted under the power to regulate or the power to tax is a matter of indifference.

In the case of *Home Insurance Company vs. New York*, 134 U. S., 600, it was held that a State may require as a condition of the grant of a franchise to a corporation and also of its continued exercise that the corporation pay a specific sum to the State each year or month or a specific portion of its gross receipts, or of the profits of the business, or a sum to be ascertained in any convenient mode which it may prescribe.

In the case of Manchester Fire Insurance Company vs. Harriott, 91 Federal, 711, a bill was filed on behalf of some thirty-two fire insurance companies doing business in the State of Iowa, but incorporated under the laws of Great Britain and other States foreign to the United States, the purpose of the bill being to test Section 1333 of the Code of Iowa, which provided that all insurance companies incorporated under the laws of a State or nation other than the United States should at the time of making the annual settlements as required by law pay into the State Treasury 3 1-2 per cent of the gross amounts of premiums received for business done in the State of Iowa during the year; that all insurance companies incorporated under the laws of a sister State of the Union should pay into the Treasury two and one-half per cent of the gross amount of premiums received during the preceding year, and that all insurance companies incorporated under the laws of the State of Iowa, not including fraternal beneficiary associations, etc., should pay into the Treasury one per cent of the gross amount received from premiums. In the bill it was averred that the complainant companies, more than fifteen years previous to its filing, were admitted into the State of Iowa for the purpose of transacting the business of insurance and that they then fully complied with all the provisions and requirements of the laws of Iowa necessary to secure their lawful admission into and recognition by the State and that they had since complied each year with the requirements of the State laws and had issued to them the certificate showing their authorization to continue business in Iowa. It was further averred that in reliance upon this action on the part of the

State complainants had expended large sums of money in establishing general agencies, in securing offices, in advertising and in providing the material necessary to conduct their business in Iowa and that they had entered into many contracts of insurance with the citizens of Iowa which were then in force and had expended large amounts in meeting the obligations arising in Iowa in connection with the business which they were authorized by the State to undertake in Iowa. After having made certain averments as to the discriminatory nature of the tax, it was charged in the bill that the provisions of the section of the code of Iowa referred to above were in violation of the Constitution of the United States and void. On behalf of the complainants it was admitted that a State had the right to wholly exclude foreign corporations, other than those engaged in interstate commerce or in carrying on the business of the United States, from admission into the State and that it might prescribe the condition upon which such companies may enter the State, but it was claimed that if foreign companies are admitted into the State and permitted to engage in business therein, the State is then debarred from imposing further conditions on the right to continue in business. It was also charged that a State was without power in the exercise of the right of taxation to impose any burden upon foreign corporations, other or more onerous than is imposed on domestic corporations engaged in the like business. The claims of the complainants were overruled and in the course of its opinion said:

“But, as I understand the decisions of the Supreme Court of the United States, the pivotal

questions involved in the case have been settled by that court. There can be no doubt upon the proposition that if a foreign corporation is admitted into a State, and lawfully engages in business therein, its property and rights within such State are entitled to the equal protection of the law, the same as those of a like domestic corporation; but that is not the point at issue in this case. The provisions of Section 1333 of the Code do not affect the property of the companies, nor impose any lien or burden thereon. They impose a burden upon the right of the companies to continue in the business within the State after the 1st of March next. This burden is in form and in substance a tax, but it is not a tax imposed upon the tangible property of the companies. It is a burden in the form of a tax, imposed as a condition upon the right of the companies to continue in business in Iowa. It cannot be denied that the State has the right to prescribe the terms, conditions, and burdens subject to which a foreign corporation can obtain the right of admission into the State, and it is beyond question that, so long as the provisions of Section 1333 remain in force, no foreign corporation can secure the privilege of admission into the State, except upon a compliance with its requirements. But it is said that, after a foreign corporation has once rightfully entered the State, and engaged in business therein, no additional burden or restrictions can be imposed as a condition to the exercise of the right to continue in business. The power and right of the State to exclude foreign corporations, not engaged in inter-

state commerce, or in the furtherance of the business of the United States, from entering the State, includes the right to preclude such foreign corporations from continuing in business, and also includes the right to impose conditions upon such continuances."

In the case of *Fire Association vs. New York*, 119 U. S., 110, a Pennsylvania corporation, which was taxed in the State of New York, was subjected to a license fee, which license ran for a period of a year and it was held that the State had the power to change the conditions of admission to the State and to impose as a condition of doing business in the State at any time or for the future the payment of a new or further tax.

We think it is clear from the foregoing that because a license or permit was granted to the plaintiff in error under a former law, the State would not thereby be estopped and precluded from imposing any further license tax or franchise tax upon the same subject, even though it changed the conditions and imposed a greater tax than the former law. The authorities above referred to and quoted from, establish the proposition, we think, firmly that unless a grant of a franchise to a foreign corporation expressly exempts it from license taxation, the imposition of such a tax is not invalid and does not impair the obligation of any contract, and further that no corporation can claim any immunity from taxation or license fees because it paid a consideration for its charter or franchise, in the absence of a stipulation on the part of the State or other taxing power that the bonus was received in lieu of any other or future taxation. It has been often held by this court that

even a provision in the charter fixing a specified sum to be paid as taxes, but not providing that such sum shall be in lieu of other taxes, is not a contract that no greater taxes shall be laid.

New Orleans City R. R. Co. vs. New Orleans, 143 U. S., 192.

Delaware R. R. Tax vs. P. W. & B. R. R. Co., 18 Wall., 206, 21 L. Ed., 888.

Railway Co. vs. Philadelphia, 101 U. S., 528.

Citizens Saving Bank vs. Owensboro, 173 U. S., 636.

Covington vs. Kentucky, 173 U. S., 231.

Lewisville Water Co. vs. Clarke, 143 U. S., 1.

See also Gray on Limitation of Taxing Power, paragraphs 1001-1008.

Murphy on Foreign Corporations, paragraphs 34-36.

Besides this, the State Constitution of Texas, which was in force at the time the permit was granted to plaintiff in error, provides that "the power to tax corporations and corporate property shall not be surrendered or suspended by act of the Legislature by any contract or grant to which the State shall be a party." (Constitution of 1876, Article 8, Section 4.)

In conclusion upon this branch of the case, we think it is clear that notwithstanding a former permit had been granted to the plaintiff in error, the inherent power remained in the State of Texas to change or amend the law at any time thereafter, even to the extent of levying an additional burden upon it for the permission to continue to do business within the State and that such change of the law was not in violation of the Constitution prohibiting any State from passing any act impairing the obligation of contracts.

SECOND.

*A foreign corporation, although engaged in interstate commerce, can not go into another State and transact there business purely local in its nature without securing from the latter State its permission and such State may impose upon the foreign corporation as a condition precedent to its right to do local business any conditions that it sees fit, or may deem expedient, "and it may make the grant or privilege dependent upon the payment of a specific license tax, or a sum proportioned to the amount of its capital."*

By its second assignment of error, the plaintiff in error asserts that Chapters 19 and 72 of the laws of Texas, 1905, are void, in that they require foreign corporations engaged in interstate commerce to pay to the State of Texas an annual franchise tax upon the capital stock, surplus and undivided profits of the corporation and that the Court of Civil Appeals of Texas erred in not holding that such a tax was a tax upon interstate commerce.

It is not denied that the State is without power to impose any conditions or restrictions upon the pursuit of interstate commerce. It cannot burden or interfere in any way with such commerce; that is a subject within the exclusive control and regulation of Congress. But on the other hand, we think it is clear that before the plaintiff in error could come into the State of Texas and there transact business, purely local in its nature, it must secure a permit from the Secretary of State and pay a permit fee and franchise tax as prescribed by the laws of Texas.

The case of *Horn Silver Mining Co. vs. New York*, 143 U. S., 305, is directly in point and fully sustains

the defendant in error in this case. There it was shown that the Horn Silver Mining Company was a foreign corporation created under the laws of the Territory of Utah. By an Act of the Legislature of New York passed in 1881 it was declared that every corporation incorporated or organized under any law of the State or of any other State or country and doing business in the State of New York, with certain specified exceptions not material in this case, should be subject to a tax "upon its corporate franchise or business," to be computed in a mode specified, which was by a certain percentage upon its capital stock measured by the dividend on the par value of that stock, or where there were no dividends or its dividends were less than a certain percentage, upon the par value of the stock, then according to a certain percentage upon the actual value of the capital stock during the year. The company denied its liability for the tax, claiming that it had been at all times a manufacturing corporation organized and existing under the laws of Utah; that it had never exercised any franchise or powers under the laws of New York; that its capital stock of ten millions of dollars was issued in payment of real estate in Utah and Illinois, which consisted entirely of mining property and improvements thereon and a refinery; that during the years ending November 1, 1881 and 1882 (the years for which the taxes were claimed), it carried on in the State of New York the business of manufacturing bars of silver from Utah and Illinois into standard bars; that said business constituted but a small portion of its entire business and was the only business carried on in the State of New York, except its financial business and correspondence. It further claimed

that its capital stock was only partially employed in New York and that it paid taxes both in Utah and in Illinois. On behalf of the company it was insisted that the statute under which the case was brought was invalid and inoperative as to it because of the facts set forth and because it established an unjust and unequal system of taxation and fixed the amount of tax wholly without regard to the amount of business done within the State or the amount of capital employed or the amount of its capital stock held in the State, and the extent of the protection and benefits derived from its laws and agencies, and because it sought to tax property and persons not within the jurisdiction of the State or in any way subject to its authority, and violated the principles of equality and uniformity. It was also insisted that the taxation attempted was, in effect, taking the private property without just compensation, the denial to defendant of the equal protection of the laws, and a *regulation of commerce among the several States*, and taxing property and business without the jurisdiction of the State of New York. All of these claims were by this Court overruled and Mr. Justice Field in the course of the opinion said:

“Having the absolute power of excluding the foreign corporation the State may, of course, impose such conditions upon permitting the corporation to do business within its limits as it may judge expedient; and it may make the grant or privilege dependent upon the payment of a specific license tax, or a sum proportioned to the amount of its capital. No individual member of the corporation, or the corporation itself, can

call in question the validity of any exaction which the State may require for the grant of its privileges. It does not lie in any foreign corporation to complain that it is subjected to the same law with the domestic corporation. The counsel for the appellant objects that the statute of New York is to be treated as a tax law, and not as a license to the corporation for permission to do business in the State. Conceding such to be the case we do not perceive how it in any respect affects the validity of the tax. However, it may be regarded, it is the condition upon which a foreign corporation can do business in the State, and in doing such business it puts itself under the law of the State, however that may be characterized."

The Court further held in the above case that though it was a hardship in estimating the amount of the tax upon the corporation, for doing business in the State, according to the amount of its business or capital without the State, still that was a matter resting entirely in the control of the State and not a matter of federal law and that in such cases this Court could not in any way interfere. In concluding its opinion, the Court said:

"The extent of the tax is a matter purely of State regulation, and any interference with it is beyond the jurisdiction of this Court. The objection that it operates as a direct interference with interstate commerce we do not think tenable. The tax is not levied upon articles imported, nor is there any impediment to their importation. The products of the mine can be

brought into the State and sold there without taxation and they can be exhibited there for sale in any office or building obtained for that purpose; the tax is levied only upon the franchise or business of the company."

It was also held that the law in question in that case did not tax property not within the State, nor deny to the corporation the equal protection of the laws, nor impose a tax beyond the constitutional power of the State.

The principles established in the above case were re-affirmed in *New York State vs. Roberts*, 171 U. S., 658. In the latter case, *Park, Davis & Co.*, a corporation organized under the laws of Michigan for the manufacture and sale of chemical and pharmaceutical preparations had a factory situated in the city of Detroit. The corporation also had a warehouse and shop in the city of New York and there kept on hand varied quantities of its manufactured products which were there sold at wholesale in original packages. The company was represented in New York by a manager who was paid a salary. The business of selling the manufactured articles was carried on in all respects like the ordinary sales of consigned goods. The company resisted the payment of a tax to the State of New York for the privilege of carrying on its business there, upon the ground that such tax constituted an interference with interstate commerce and was void. The court overruled this contention, citing as an authority for its decision the case of *Horn Silver Mining Company vs. N. Y.*, *supra*. It is true that at the time of the decision in the case of *New York State vs. Roberts*, the statute of New York had been amended so as to base the tax upon the amount

of capital used in the State, but the court did not rest its decision upon the change in the statute.

Much reliance is placed by plaintiff in error upon the decisions of this Court in the cases of *Western Union Telegraph Co. vs. Kansas*, 216 U. S., 1-77, but we do not think that those cases are authorities against the defendant in error. In those cases it was held by this Court that a statute of Kansas prohibiting the corporations named from entering the State and transacting a local business until they had paid to the State the permit fee or tax based on the entire capital of the company, constituted an unlawful interference with interstate commerce. Those cases are, however, we think, clearly distinguishable from the case at bar. There both of the corporations were common carriers and public service corporations and engaged directly and regularly in interstate commerce, the business of one being the transportation of messages and that of the other the transportation of persons, and both companies operating throughout the States. Here we have an ordinary trading corporation, engaged in a purely private enterprise. Mr. Justice Harlan, who wrote the opinions in this Court in both of the cases referred to above, recognized this distinction. In the course of his opinion, on page 33, it is said:

“But it is said to be well settled that a State, in the exercise of its reserved powers, may prescribe the terms on which a foreign corporation, whatever the nature of its business, may enter and do business within its limits.

“It is true that in many cases the general rule has been laid down that a State may, if it chooses

to do so, exclude foreign corporations from its limits, or impose such terms and conditions on their doing business in the State as in its judgment may be consistent with the interests of the people. But those were cases in which the particular foreign corporation before the court was engaged in ordinary business and not directly or regularly in interstate or foreign commerce."

Again on page 40 of the opinion in the Western Union case, Mr. Justice Harlan quoted from and approved the case of *Pullman Company vs. Adams*, 189 U. S., 420-429. That case involved the validity of a tax of a certain amount imposed by Mississippi on each sleeping and palace car company carrying passengers from one point to another within the State. It was shown that the Pullman Company was an Illinois corporation. These sleeping cars were carried by various railroad companies and all of them were carried into the State of Mississippi from another State or out of the State to another State, or both, but such carriers in their passage also carried passengers from point to point within the State and a specific fare was collected for such carriage. The company offered to show that its receipts from this class of passengers did not equal the expense chargeable against such receipts. It contended that these facts would show that the business within the State was merely a burden on its commerce between the States, and it argued that it was compelled to assume that burden by reason of the provision in the Mississippi Constitution declaring sleeping car companies to be common carriers. On the assumption that the companies would be free to abandon

the business taxed if they saw fit, it was held by this Court that the tax was not void as an interference with interstate commerce, distinguishing *Crutcher vs. Kentucky*, 141 U. S., 47, and following *Osborne vs. Florida*, 164 U. S., 650.

In the case at bar the plaintiff in error is an ordinary trading corporation, free to come into the State of Texas for the purpose of transacting an interstate business and the statute in question does not impose any restrictions or interference whatever with the conduct of such business. The right of a foreign corporation to come into the State of Texas for the purpose of transacting its interstate business, without first obtaining a permit, is unquestioned, and such companies are not required to pay any franchise tax for the privilege of carrying on such business.

See *Allen vs. Tyron—Jones Buggy Co.*, 91 Texas, 22.

*Miller vs. Goodman*, 91 Texas, 41.

*Lassiter vs. Miller and Elevator Co.*, 22 Texas Civ. App., 33.

*Railway Co. vs. Davis*, 93 Texas, 378.

The above decisions establish conclusively that the Plaintiff in Error is allowed to carry on its interstate business in Texas without obtaining a license and that it was not coerced into obtaining a license for doing business within the State by any refusal otherwise to permit its interstate business here. If the statute under consideration prohibited the Plaintiff in Error from transacting any business in Texas without securing a license and paying the franchise tax therefor, then of course it would be unconstitutional. The distinction between such statutes and the one under consideration here is illustrated by

two decisions of this Court. In *Crutcher vs. Kentucky*, 141 U. S., 47, the act in question prohibited the agent of a foreign express company from carrying on business at all in that State without first obtaining a license from the State. The company was thus prevented from doing any business, even of an interstate character, without obtaining the license in question. The Act was held to be a regulation of interstate commerce in its application to corporations or associations engaged in that business and that subject was held to belong exclusively to national and not State legislation. In the course of the opinion, Mr. Justice Bradley said that "taxes or license fees, in good faith imposed exclusively on express companies carried on wholly within the State, would be open to no such objection," viz.: an objection that the tax or license was a regulation of or that it improperly affected interstate commerce. In the later case of *Osborne vs. Florida*, 164 U. S., 650, the State statute required all express companies doing business in the State to pay a certain arbitrary fixed sum as a license tax for doing business. As construed by the Supreme Court of the State of Florida, this tax was held payable only by an express company which did a local business within the State, though a company doing such business must pay the tax even if it also carried on interstate commerce. The tax was held constitutional. Mr. Justice Peckham said:

"The statute herein differs from the cases where statutes upon this subject have been held void, because in those cases the statutes prohibited the doing of any business in the State whatever, unless upon the payment of the fee or tax.

It was said, as to those cases, that as the law made the payment of the fee, or the obtaining of the license, a condition to the right to do any business whatever, whether interstate or purely local, it was on that account a regulation of interstate commerce, and therefore void. Here, however, under the construction as given by the State court, the company suffers no harm from the provisions of the statute. It can conduct its interstate business without paying the slightest heed to the act, because it does not apply to, or in any degree affect the company in regard to that portion of its business which it has the right to conduct without regulation from the State.

"The company in this case need take out no license, and pay no tax for doing interstate business, and the statute is therefore ~~void~~ *valid*."

We wish to call attention again here to the decisions of the courts of Texas to the effect that foreign corporations are not required to secure any permit or license to carry on in the State its interstate business, but that the statutes requiring permit and franchise taxes apply only to foreign corporations doing purely a local business in Texas, which business, as we have already stated, they are free to renounce.

In the case of *Waters Pierce Oil Company vs. Texas*, 177 U. S., p. 28, a permit was granted to the Company by the State of Texas authorizing it to transact business in the State and while so engaged it violated the statute of the State against illegal combinations in restraint of trade and thereby under the statute of the State incurred a forfeiture of its permit to do business in the State. Transactions of

interstate commerce were withdrawn from the jury and were also excepted from the judgment. The transactions of local commerce, which were held by the several courts of Texas to be violations of the statutes consisted in contracts with certain merchants by which the said Company required them to buy oils exclusively from it and from no other source or buy oils exclusively from it and not to sell to any other person handling competing oils or to buy exclusively from it and to sell at a price fixed by it. It was claimed on behalf of the Company that the statute making it unlawful for any foreign corporation violating any of the provisions of the Act to do business in the State prohibited all business of foreign corporations and hence was unconstitutional as including interstate commerce, and further that it could not be limited by judicial construction to local business, so that the unconstitutional taint would thereby be removed. These contentions were overruled by this Court. Upon this point Mr. Justice McKenna, after referring to a number of previous decisions by this Court, said: "The courts of Texas have like power of interpretation of the statutes of Texas. What they say of the statutes of that State mean we must accept them to mean whether it is declared by limiting the objects of their general language or by separating their provisions into valid and invalid parts." It was held in this case that the Texas statute in question did not constitute any restriction or interference with interstate commerce and was not in violation of the Constitution of the United States. It also reaffirmed what had been many times theretofore decided, that is, that the right of a foreign corporation to engage in business within a State other than

that of its creation depends solely upon the will of such other State and that the State could grant its permit to the foreign corporation upon such terms and conditions as it may think proper to impose. This case contains an interesting discussion of the general question under consideration. In Florida a statute was passed providing that all express companies doing business in the State should pay a license fee in cities and towns and the Supreme Court of that State construed the statute to apply to business that was domestic or intra-state, for the reason that any other construction would place it in conflict with the Federal Constitution. *Osborne vs. State*, 33 Fla., 162.

The Supreme Court of Mississippi similarly construed a statute imposing a privilege tax on each sleeping and palace car company carrying passengers from one point to another in the State. *Pullman Co. vs. Adams*, 78 Miss., 814.

A like holding was made in *Attorney General vs. Electric Storage Battery Co.*, 188 Mass., 239.

The Florida and Mississippi cases referred to were approved by this court. *Osborne vs. Florida*, 164 U. S., 160; *Pullman Co. vs. Adams*, 189 U. S., 420.

It is clear that the statutes of Texas under consideration must be construed to have been intended to impose terms upon the right of a foreign corporation to carry on intra-state business, and not to carry on inter-state business, and that as so construed they are valid statutes.

Like holdings were made by this Court in the cases of *Kehrer vs. Stewart*, 197 U. S., 60, and *Armour Packing Co. vs. Lacy*, 200 U. S., 226. The cases of *Dozier vs. Alabama*, 218 U. S., 124; *Caldwell vs. North Carolina*, 187 U. S., 622; *Stockard vs. Morgan*, 185 U. S., 27, and many others, including the so-called drummer

cases, are cited to show that a State cannot impose a privilege tax or occupation tax upon foreign corporations for coming into the State and there selling its goods. That proposition is not denied. We do not contend that a State had any such power. We freely admit, as it is abundantly established by the decisions of this Court, that a foreign corporation cannot be interfered with in the prosecution of its interstate commerce business. It can engage in any business interstate in its nature without being required to comply with any local requirements or conditions. The State of Texas does not seek to impose a tax upon such business.

There is a difference between an ordinary commercial business and the business of a public service company, which is directly engaged in interstate commerce. It is firmly established by the decisions of this Court that the ordinary commercial corporation may be taxed for the privilege of doing business even though part of its business consists of the sale of goods brought from another State, provided part of its business is or may be the sale of domestic goods. (See Beale on Foreign Corporations, Section 754.) This Court has more than once pointed out the distinction between corporations organized to carry on interstate commerce and having a quasi-public character, and corporations organized to conduct strictly private business. On this point Mr. Justice Shiras, on delivering the opinion of this Court in the case of *New York State vs. Roberts*, 171 U. S., 664, said:

“When a corporation of one State, whose business is that of a common carrier, transacts part of that business in other States, difficult ques-

tions have arisen, and this Court has been called upon to decide whether certain taxing laws of the respective States infringe upon the freedom of interstate commerce. It has been found difficult to prescribe a satisfactory rule whereby the public burdens of taxation can be justly apportioned between the business and agencies of such a corporation in different States, and the subject has been much discussed in several recent cases. *Western Union Telegraph Co. vs. Mass.*, 125 U. S., 530; *Pittsburg, Cincinnati, etc. Ry. vs. Backus*, 154 U. S., 421; *Pullman Palace Car Co. vs. Pennsylvania*, 141 U. S., 18; *Adams Express Co. vs. Ohio*, 165 U. S., 194. It is not necessary in this case to enter into a subject so difficult, *but the cases are referred to as showing the distinction between corporations organized to carry on interstate commerce, and having a quasi-public character, and corporations organized to conduct strictly private business.*"

The court further held that the corporation concerned in that case (whose business was similar to the business of Plaintiff in Error) was of the latter character and that it came within the doctrine of *Horn Silver Mining Co. vs. New York*, 143 U. S., 305.

The distinction that we have pointed out is again illustrated in the case of *People ex rel Klipstein vs. Roberts*, 55 New York Supplement, 950. In that case the relator was a foreign corporation organized under the laws of the State of New Jersey with a paid up capital stock of \$200,000. It carried on in the city of New York during the years for which the tax was levied the business of dealing in chemicals and

dye stuffs. Sixth-sevenths of such business consisted of importing from the countries in Europe chemical and dye stuffs and selling the same in original packages as imported. One-seventh of this business consisted of the sale of broken packages of this imported goods and also of some domestic goods of the like character. The tax for the privilege of doing business in New York was based upon the capital stock of the company and it was insisted by the company that since six-sevenths of its business consisted in foreign commerce, any tax imposed upon such business was in the nature of a regulation of such commerce and under Article I of Section 10 of the Constitution of the United States, giving to Congress the power to regulate commerce with foreign nations, was withdrawn from the power of the State and wholly committed to the United States. The claims of the Company were not sustained, but the tax was held to be valid and not in violation of the constitutional provision referred to. The court in its opinion said:

“If the relator’s business had been wholly that of foreign or interstate commerce, it doubtless would be entitled to the exemption it seeks (*People vs. Wemple*, 138 N. Y., 1, 33 N. E., 720), unless the fact that it conducted a strictly private business, and not a business of a quasi public character, like that of a common carrier, would exclude it from the protection accorded to the relator in the case cited—a distinction referred to in the case of *Parke, Davis & Co.*, below cited, as fruitful of difficulty. But as this relator is engaged partly in domestic or intra-state com-

merce, and the power of taxation upon the latter business, and the privilege of doing it when carried on within this State by a foreign corporation, are within the competency of the State, and thus the power to prescribe the basis of its measurement is also within its competency, it follows that the statutes imposing and measuring the tax must be considered, as they may be, as not transcending the legislative power of the State. Such was the intimation of the court in the case above cited—an intimation which is supported by the more recent case of *Osborne vs. Florida*, 164 U. S., 650, 17 Sup. Ct., 214, and, as we think, authoritatively confirmed by the recent case of *People ex rel Parke, Davis & Co. vs. Roberts*, decided in October, 1898, by the Supreme Court of the United States, upon appeal from the judgment of our court of appeals. 91 Hun., 158, 36 N. Y. Supp., 368; *Id.*, 149 N. Y. 608, 44 N. E., 1127. The Supreme Court of the United States says:

“No tax is sought to be imposed directly upon imported articles, or on their sale. This is a tax imposed on the business of a corporation, consisting in the storage and distribution of various kinds of goods, some products of their own manufacture and some imported articles. From the very nature of the tax, being laid as a tax upon the franchise of doing business as a corporation, it cannot be affected in any way by the character of the property in which its capital stock is invested.”

In the case of *Pembina Mining Co. vs. Pennsyl-*

vania, 125 U. S., 182, it appeared that the said Mining Company was incorporated under the laws of Colorado with an authorized capital of one million dollars, for the purpose of carrying on a general mining and milling business in that State. Its principal office was at Alpine, Colorado, but it also had an office in the city of Philadelphia for the use of its officers, stockholders, agents and employes. On October 31, 1881, the Auditor General and Treasurer of Pennsylvania assessed a tax against the corporation for "office license" from July 1, 1881, to July 1, 1882, at the rate of one-fourth of a mill on each dollar of its capital stock, and added to the amount a penalty for failure to take out a license. Said tax was assessed and penalty imposed under an Act of the Legislature of Pennsylvania, entitled "An Act to provide revenue by taxation," said Act being as follows: "That from and after the first day of July, A. D. 1879, no foreign corporation, except foreign insurance companies, which does not invest and use its capital in this Commonwealth, shall have an office or offices in this Commonwealth, for the use of its officers, stockholders, agents, or employes, unless it shall first have obtained from the Auditor General an annual license so to do; and for said license every such corporation shall pay into the State Treasury, for the use of the Commonwealth, annually, one-fourth of a mill on each dollar of capital stock which said company is authorized to have, and the Auditor General shall not issue a license to any corporation until said license fee shall have been paid. The Auditor General and State Treasurer are hereby authorized to settle and have collected an account against any company violating the provisions of this section for the amount of

such license fee, together with a penalty of fifty per centum for failure to pay the same: *Provided*, That no license shall be necessary for any corporation paying a tax under any previous section of this Act, or whose capital stock, or a majority thereof, is owned or controlled by a corporation of this State which does pay a tax under any previous section of this act." This tax was assailed upon the ground, among others, that it was in conflict with the clause of the Constitution of the United States declaring that Congress shall have power to regulate commerce with foreign nations and among the several States, and also with the clause declaring that the citizens of each State shall be entitled to all the privileges and immunities of citizens in the several States. This Court denied the claims of the company, and in the course of its opinion said:

"It is not perceived in what way the statute impinges upon the commercial clause of the Federal Constitution. It imposes no prohibition upon the transportation into Pennsylvania of the products of the corporation, or upon their sale in the Commonwealth. It only exacts a license tax from the corporation when it has an office in the Commonwealth for the use of its officers, stockholders, agents, or employes. The tax is not for their office, but for the office of the corporation, and the use to which it is put is presumably for the latter's business and interest. For no other purpose can it be supposed that the office would be hired by the corporation.

"The exaction of a license fee to enable the corporation to have an office for that purpose

within the Commonwealth is clearly within the competency of its Legislature. It was decided long ago, and the doctrine has been often affirmed since, that a corporation created by one State cannot, with some exceptions, to which we shall presently refer, do business in another State without the latter's consent, express or implied. In *Paul vs. Virginia*, 8 Wall., 168, this Court, speaking of a foreign corporation (and under that definition the Plaintiff in Error, being created under the laws of Colorado, is to be regarded), said: "The recognition of its existence even by other States, and the enforcement of its contracts made therein, depend purely upon the comity of those States—a comity which is never extended where the existence of the corporation, or the exercise of its powers are prejudiced to their interests, or repugnant to their policy. Having no absolute right of recognition in other States, but depending for such recognition and the enforcement of its contracts upon their assent, it follows as a matter of course that such assent may be granted upon such terms and conditions as those States may think proper to impose. They may exclude the foreign corporation entirely; they may restrict its business to particular localities; or they may exact such security for the performance of its contracts with their citizens as in their judgment will best promote the public interests. The whole matter rests in their discretion."

Further, in the same opinion, this Court said that the recognition of the existence of the corporation in

Pennsylvania, even to the limited extent of allowing it to have an office within its limits for the use of its officers, stockholders, etc., was a matter dependent upon the will of the State and that it could make the grant of the privilege conditional upon the payment of a license tax and fix the sum according to the amount of the authorized capital of the corporation.

See *Bank of Augusta vs. Earle*, 13 Pet., 519; *Lafayette Insurance Co. vs. French*, 18 How., 404; *St. Clair vs. Cox*, 106 U. S., 350.

It is insisted by the Plaintiff in Error in its brief that since it appears from the allegations of its petition that it was doing an interstate business, it is not subject to the franchise tax demanded of it and that the tax having been paid under protest, it should be held to have the right to recover it. In reply to this contention it may be said that Plaintiff in Error filed a certified copy of its articles of incorporation with the Secretary of State of the State of Texas and made application for a permit to transact its business in the State of Texas, and it was no fault of the State that it failed to conduct a business therein in accordance with its permit. The ground of the protest was not that the tax was illegal because of the fact that Plaintiff in Error was doing only an interstate business, but for the reason alone, as stated in its protest, that the law itself imposing the franchise tax, was unconstitutional and void. Upon this point the case of *Moline Plough Co. vs. Wilkinson*, 105 Mich., 57, fits this case exactly. The court held in that case that the statute of Michigan, which required every foreign corporation or association permitted after the passage of said act to transact business in that State, which had not, prior to the pas-

sage of said act, filed or recorded its articles of association under the laws of the State, and been thereby authorized to do business therein, to pay a designated franchise fee, was not in conflict with subdivision 3, Section 8, Article 1, of the Constitution of the United States, providing that Congress shall have power to regulate commerce with foreign nations and among the several States. It was also held that that statute did not apply to foreign corporations whose business within the State consisted merely of selling through itinerant agents, and delivering commodities manufactured out of the State, but that where a corporation so engaged filed a copy of its articles of association in the State and paid the specified franchise fee, under protest, it could not compel the re-payment thereof. In its opinion the court said:

“It is claimed, however, that this act was held unconstitutional in the case of *Coit & Co. vs. Sutton*, 102 Mich., 324. The validity of the act was not questioned in that case. It was held not to apply to the facts there stated. The party there was simply selling goods within this State manufactured by a foreign corporation. The corporation was not asking to have its articles of information filed within the State. It was said that the act in question did not apply to foreign corporations whose business within this State consisted merely of selling through itinerant agents, and delivering commodities manufactured outside of this State. Here the relator not only sells its products through itinerant agents, but it comes within the State, asking to have its articles of association filed here, and

that it may be put on the same footing with our own home corporations. The act gives the foreign corporation the same privileges as domestic ones, but provides that it must comply with the act by paying the franchise fee which a domestic corporation must pay. The relator has had its articles of association filed here, has paid the franchise fee provided by the act, and is not entitled to have its money repaid."

THIRD.

*The statutes of Texas under consideration (Acts twenty-ninth Legislature, 1905, pages 22, 100, Chapters 19, 722) are not invalid by reason of the fact that they impose a greater franchise tax upon foreign corporations than upon domestic corporations.*

By its third assignment of error Plaintiff in Error contends that the Acts of the Twenty-ninth Legislature of Texas, known as Chapters 19 and 72 of the General Laws of the Twenty-ninth Legislature, are "in violation of Paragraph 3, Section 8 of the first Article of the Constitution of the United States, conferring upon Congress the power to regulate commerce among the several States, in that it appears from said Acts of the said Twenty-ninth Legislature of the State of Texas that a discriminating tax is imposed by them against foreign corporations in favor of domestic corporations upon interstate business done by said foreign corporations." In support of this contention the Plaintiff in Error places much reliance upon the cases of *Western Union Telegraph Company vs. Kansas*, 216 U. S., 1; *Pullman Palace Car Co. vs. Kansas*, 216 U. S., 56; *Southern Railway Company vs. Green*, 216 U. S., 400, and *Ludwig vs. Western Union Telegraph Co.*, 216 U. S., 146. The authorities cited do not bear out the claim made and they are not against the proposition that we are contending for. None of the cases referred to have any application to the point under discussion, except perhaps the case of *Southern Railway Company vs. Green*, but that case rather supports the Defendant in Error than the Plaintiff in Error. There an action was brought in the city court of Birmingham, Alabama, by the South-

ern Railway Company to recover the sum of \$22,458.36 for so much money received by the defendant as judge of the probate court of Jefferson County, Alabama, which sum the company claimed was wrongfully exacted from it under the provisions of the Act of Alabama of March, 7, 1907. The sum sued for was the amount taxed against the Southern Railway Company under the said legislative act, and under the practice in Alabama, if illegally collected, could be recovered. The Act in question provided for the payment of an annual franchise tax to the probate judge by every foreign corporation authorized to do business within the State, in which it had a resident agent, with certain exceptions, for the use of the State, and the statute further provided that no foreign corporation required to pay a tax therein should do any business in the State of Alabama not constituting interstate commerce, or maintain any action in any of the courts of the State upon contracts made in the State other than contracts based upon interstate commerce, unless such corporation has paid said tax. The payment of the franchise tax required by the statute did not exempt any corporation paying the same from payment of the regular license or privilege tax specified or required for engaging in or carrying on business, the license for which was required from individuals, firms or corporations. In addition to the amount of the franchise tax required to be paid to the State, such foreign corporations were required to pay to the county an amount equal to one-half of the amount paid to the State. It was claimed that this Act was unconstitutional and void, as it impaired the obligations of a contract between the corporation and the State of Alabama, and in that it deprived the corporation of its property without due process of law and denied to it the equal protection

of the laws. In this case it was shown that the Southern Railway Company was created under the laws of the State of Virginia; that it organized in October, 1894, and since that time had carried on the business of acquiring, owning and operating lines of railroads in various States and conducting interstate and intrastate transportation of persons and property; that in conformity with the laws of Alabama, on July 16, 1894, it filed in the office of the Secretary of State a copy of its charter and designated an agent upon whom service could be made, and that at the same time it paid to the Treasurer of the State of Alabama the amount required as a license fee for beginning business in the State. It was further shown that after thus complying with the laws of Alabama, it commenced carrying on its authorized business within the State and had therein carried on the same business ever since; that between the time of entering the State and the year 1899 it purchased and acquired as permitted and authorized by the laws of Alabama various lines of railroad and the franchises under which they had been built and operated, which lines were connected with and contiguous with other lines owned by the company. It was further shown that the statute of 1907 under which it was compelled to pay the tax in question did not apply to persons or corporations of the State of Alabama owning the same character of property and carrying on the same kind of business. Under these facts it was held that the statute, in so far as it applied to the Southern Railway Company, was void. In stating the question before the court in that case, Mr. Justice Day said:

“The important Federal question for our determination in this case is: When a corporation of an-

other State has come into the taxing State, in compliance with its laws, and has therein acquired property of a fixed and permanent nature, upon which it had paid all taxes levied by the State, is it liable to a new and additional franchise tax for the privilege of doing business within the State, which tax is not imposed upon domestic corporations doing business in the State of the same character as that in which the foreign corporation is itself engaged?"

Again, in the same opinion, it is said:

"In the case at bar we have a corporation which has come into and is doing business within the State of Alabama, with the permission of the State and under the sanction of its laws, and has established therein a business of a permanent character, requiring for its prosecution a large amount of fixed and permanent property which the foreign corporation has acquired under the permission and sanction of the laws of the State. This feature of the case was dealt with by Mr. Justice Brewer, then a circuit judge, in the case of *Ames vs. Union Pacific Railroad Company*, 64 Federal, 165, 177, wherein he said: 'It must always be borne in mind that property put into railroad transportation is put there permanently. It can not be withdrawn at the pleasure of the investors. Railroads are not like stages or steamboats, which, if furnishing no profit at one place, and under one prescribed rate of transportation, can be taken elsewhere and put to use at other places and under other circumstances. The railroad must stay, and, as a permanent invest-

ment, its value to its owners may not be destroyed. The protection of property implies the protection of its value."

The distinction between the case just referred to and quoted from and the case at bar is easily apparent. In the case at bar it was not shown that the Plaintiff in Error had a single dollar invested in property in the State of Texas. It alleged that it was engaged in business at Richmond, Indiana, in the manufacture and sale of threshing machinery, portable traction engines, saw mills, etc., and that its office and principal place of business was located in Richmond, Indiana, and that it only transacted an interstate business in the State of Texas in the sale of its manufactured products. It further alleged that it employed in Dallas and Houston, Texas, agents for the purpose of soliciting and superintending the soliciting of orders for the goods manufactured by it at Richmond, Indiana. But, as already stated, the said company applied for and obtained a permit authorizing it to transact local business in Texas.

Except under conditions such as obtained in the case just referred to, it has been held many times by this Court that the State can discriminate and determine the degree of discrimination to be made between the privileges of foreign and domestic corporations carrying on business within the State. Upon this point this court in the case of *Waters Pierce Oil Company vs. Texas*, *supra*, used the following language:

"It is said that the statutes of Texas limit its right to make contracts and take away the property or liberty assured by the Fourteenth Amendment of the Constitution of the United States. Besides, it

is asserted that the statutes *can not make discrimination*, between persons and classes of persons, and able arguments are built upon their alleged injustice and oppression. We are not called upon to answer these arguments or to condemn or vindicate the statutes on this record.

"The Plaintiff in Error is a foreign corporation, and what right of contract has it in the State of Texas? This is the only inquiry, and it can not find an answer in the rights of natural persons. It can only find an answer in the rights of corporations and the power of the State over them. What those rights are and what that power is has been often declared by this Court."

In *Ducat vs. Chicago*, 10 Wall, 410, it is held that a State has the power to discriminate between domestic corporations and foreign corporations doing business in the State; that it can determine the degree of discrimination as applied to business done in the State and impose different and heavier burdens upon a foreign corporation than upon domestic corporations engaged in the same business. It follows as a corollary from the power to exclude foreign corporations altogether, that the State may impose any conditions or restrictions that it sees fit upon the admission of foreign corporations to do business in the State.

In *Pennsylvania Fire Association vs. New York*, 119 U. S., 110, it was shown that a Pennsylvania fire insurance corporation began doing business in New York in 1872 and continued thereafter until 1882, receiving from year to year certificates of authority from the proper officer, under a statute of New York passed in 1853. By Chapter 694 of the laws of New York of 1865,

as amended by Chapter 60 of the Laws of 1875, it was provided that whenever the laws of any other State should require from a New York corporation a greater license fee than the laws of New York then required from companies of such other State all such companies of such other State should pay in New York a license fee equal to that imposed by such other State on New York companies. In 1873 Pennsylvania passed a law requiring from every insurance company of another State as a prerequisite to a certificate of authority a yearly tax of 3 per cent of the premiums received by it in Pennsylvania during the preceding year. In 1882 the insurance officer of New York required the Pennsylvania corporation to pay as a license fee a tax of 3 per cent of the premiums received by it in New York in 1881. In this case it was claimed on behalf of the company that the tax was unlawful because the corporation was a "person" within the meaning of the Constitution of the United States and that the equal protection of the laws had been denied to it, but this Court held that the constitutional provision referred to had no application because the defendant being a foreign corporation was not within the jurisdiction of New York until admitted by the State on a compliance with the condition of admission imposed, namely, the payment of the tax required as a license fee. In the course of the opinion the Court said:

"The same ruling was made in *Ducat vs. Chicago*, 10 Wall, 410, where 'it was said that the power of a State to discriminate between her own corporations and those of other States desirous of transacting business within her jurisdiction being clearly established, it belonged to the State to de-

termine as to the nature or degree of discrimination, subject only to such limitations on her sovereignty as may be found in the fundamental law of the Union."

Of course the tax of 3 per cent upon the premiums of the company constituted a discrimination against it, but under the reserved power of the State to exclude foreign corporations or admit them upon such terms as it seems fit, the State has a right to discriminate.

See *Liverpool Insurance Co. vs. Mass.*, 10 Wall, 566. 566.

*Bank of Augusta vs. Earle*, 13 Pet., 519, 588.

*Doyle vs. Continental Insurance Co.*, 94 U. S., 535.

*Cooper Manufacturing Co. vs. Ferguson*, 113 U. S., 727.

To the same effect see also *Manchester Fire Insurance Co. vs. Herriott*, 91 Fed., 711; *Home Insurance Co. vs. Swigert*, 104 Ill., 653.

In *Pembina Consolidated Silver Mining & Milling Co. vs. Pa.*, 125 U. S., 181, it was held by this Court that the provisions of the Fourteenth Amendment to the Constitution, Section 1, that "no State shall deny to any person within its jurisdiction the equal protection of the laws," do not prohibit a State from requiring for the admission within its limits of a corporation of another State such conditions as it chooses. It was also held in this case following *Ducat vs. Chicago*, 10 Wall, 410, *supra*, that the power of the State to discriminate between her own domestic corporations and those of other States desirous of transacting business within her jurisdiction was clearly established, citing *Augusta vs. Earle*, 13 Peters, 519, and *Pennsylvania Fire Association vs. New York*, 119 U. S., 110, 120, *supra*.

In *American Smelting Co. vs. Colorado*, 204 U. S., 113, this Court held that it was within the power of the State to impose upon foreign corporation seeking admission to the State franchise taxes at a higher rate than were imposed upon domestic corporations of a like character. That case is directly in point upon the proposition now under discussion and fully sustains the Defendant in Error. (See also *Murfree on Foreign Corporations*, Section 162.)

In the case of *Southern Building & Loan Association vs. Norman*, 98 Ky., 294, 56 Amer. State Reps., 367, it was held that the statute of Kentucky, taxing foreign insurance companies at a greater percentage of their gross receipts than domestic ones did not violate the requirement of uniformity. This decision was based upon the principle which has been frequently applied, that a foreign corporation may only do business and exercise its franchises in any State by the permission of that State, which may attach such conditions as it pleases to its consent. See also to the same effect *Hughes vs. City of Cairo*, 92 Ill., 399; *Commonwealth vs. Milton*, 12 B. Mon. (Ky. 212) 54 Amer. Dec., 522; *Gray on Limitation of Taxing Power*, Sec. 1318, and authorities there cited.

In the case of *Humphreys vs. State*, 7 Ohio State, 67, 101 Amer. State Rep., 889, it was held that a statute imposing an inheritance tax upon foreign corporations was not unconstitutional as constituting an unlawful discrimination against them, because a like tax was not imposed upon domestic corporations of the same character. This decision is an interesting discussion of the whole question and the power of the State to discriminate against foreign corporations and in favor of its domestic corporations. It reviews most of the decisions of this

Court upon that subject and fully sustains our position.

The State may in its discretion require a foreign corporation to comply with certain prescribed formalities, to pay taxes, licenses, etc., and to assume obligations that may be required of it as a condition precedent to its right to transact business within its jurisdiction.

Paul vs. Virginia, 8 Wall, 168.

Liverpool Insurance Co. vs. Mass., 10 Wall, 566.

St. Claire vs. Cox, 106 U. S., 350.

Second Morwitz on Corporations, (2nd Ed.) Sec. 971.

It has been uniformly held that corporations are not citizens within the meaning of Section 2, of Article 4, of the Constitution of the United States, which provides that the citizens of each State shall be entitled to all the privileges and immunities of citizens in the several States.

Bank of Augusta vs. Earle, 13 Peters, 519.

Paul vs. Virginia, 8 Wall, 186.

Cooley on Taxation, 2nd Ed., 100.

As a necessary deduction from the principles stated, it is clear that a State has power to discriminate against foreign corporations desiring to transact business within its territory, and it has been expressly held, as already shown in this brief, both by the State and Federal courts, that a State has the right to impose upon corporations chartered by other States a tax or burden for the privilege of transacting their business therein although no such burdens or less burdens are imposed upon like corporations chartered by its own Legislature. (Angell & Ames on Corporations, Section 486a.) See interesting discussion of this question in note in 95 Amer. Decisions, page 536, where many authorities are collated and reviewed.

A number of decisions by this court and by the courts of the States are cited by the Plaintiff in Error holding unconstitutional State statutes imposing a discriminating tax upon non-resident traders trading within the limits of the State enacting the law. We do not claim that such statutes would not be unconstitutional, but that question is not involved in this case. The proposition that a State can not levy greater taxes upon non-resident traders or merchants within its jurisdiction than upon resident traders or merchants is illustrated in the cases of *Ward vs. Maryland*, 79 U. S., 418; *Guy vs. Baltimore*, 100 U. S., 434; *Woodruff vs. Parham*, 8 Wall., 123; *Hinson vs. Lott*, 8 Wall., 148, and a number of other decisions by this court, but as we have already attempted to point out, those cases have no application to the case at bar.

The tax under consideration in this case is not a property tax, but a tax upon foreign corporations for the privilege of doing local business within the State of Texas. See *Home Insurance Co. vs. New York*, 134 U. S., 600; *Ashley vs. Ryan*, 153 U. S., 436.

A State may, as has been seen, tax any privilege it grants. Such a tax, or rather license fee, is the payment exacted of a foreign corporation for the privilege of doing business within the State. Since a foreign corporation may be allowed to do business in the State upon conditions, the payment of a sum of money may be made a condition, and this may in form be the payment of a greater tax or different tax from that paid by a domestic corporation. Such a tax is undoubtedly valid. Beale on Foreign Corporations, Sec. 509; *Pembina Mining Co. vs. Pa.*, 125 U. S., 181; *Horne Silver Mining Co. vs. New York*, 103 U. S., 305; *Ducat vs. Chicago*, 10 Wall., 401.

It is not properly an exercise of the power to tax property, but is a license fee paid for the privilege of entering the State, and its validity is a necessary deduction from the right absolutely to exclude the foreign corporation. See Beale on Foreign Corporations, Sec. 509; and authorities there cited, including *Ashley vs. Ryan*, 153 U. S., 436.

#### FOURTH.

*The Acts of the Legislature of Texas, known as Chapters 19 and 72 of the Twenty-ninth Legislature, are not in violation of Section 1 of the Fourteenth Amendment to the Constitution of the United States, which provides that no State shall deprive any person of life, liberty or property without due process of law, in so far as they authorize and empower the Secretary of State to declare forfeitures of permits of foreign corporations failing to comply with the statute requiring the payment of franchise taxes.*

In its Fourth Assignment of Error the Plaintiff in Error asserts that the Texas statutes above referred to are unconstitutional and void, in that they authorize the Secretary of State of Texas to adjudge and declare forfeitures of permits of foreign corporations without judicial intervention and ascertainment. The assignment is not briefed, but we presume that the objection intended to be made is that such statutes do not constitute due process of law. It may be contended that due process of law contemplates a judicial hearing and determination by court, but judicial proceedings in matters of this kind are not required. In Volume 5, Ency. United States Supreme Court Reports, page 629, it is said:

“Though due process of law generally implies and includes actor reus, judex, regular allegations, opportunity to answer and a trial according to some settled course of judicial proceedings, yet this is not universally true. Under the law of England, after Magna Charta, and as it was acted on here, there were cases in which process, in its nature

final, issued against the body, lands and goods without such trial. It was not the purpose of the due process clauses of the Constitution to overturn this practice, and it follows that while generally both public and private wrongs are redressed through judicial actions, there are summary extraordinary judicial remedies for both, in which the decisions of executive or administrative officers, acted within their powers expressly conferred, are due process of law," citing *Murray vs. Hoboken Land Co.*, 18 How., 272 *McMillan vs. Anderson*, 95 U. S., 37; *Davidson vs. New Orleans*, 96 U. S., 97; *Public Clearing House vs. Coin*, 194 U. S., 497; *Bushnell vs. Leland*, 164 U. S., 684, and many other authorities.

In *Murray vs. Hoboken Land Co.*, *supra*, this Court said:

"All governments, in all times, have found it necessary to adopt stringent measures for the collection of taxes and to be rigid in the enforcement of them. These measures are not judicial; nor does the government resort, except in extraordinary cases, to the courts for that purpose. The revenue measures of every civilized government constitute a system which provides for its enforcement by officers commissioned for that purpose."

To the same effect see *Snyder vs. Marks*, 109 U. S., 189; *Hilton vs. Merritt*, 110 U. S., 97; *Arnsom vs. Murphy*, 116 U. S., 579.

Taxes have not as a general rule in this country been collected by regular judicial proceedings. The necessi-

ties of the government, the nature of the duties to be performed and the customary usages of the people, have established a different procedure, which in regard to that matter, has always been regarded as due process.

See *McMillan vs. Anderson*, 95 U. S., 37.

*Hager vs. Reclamation District*, 111 U. S., 701.

*Springer vs. United States*, 102 U. S., 586, and authorities cited on page 631 of Volume 5, *Ency. of U. S. Supreme Court Reports*.

FIFTH.

*The taxes sought to be recovered in this case were voluntarily paid and therefore can not be recovered back, even though improperly collected.*

It is contended on behalf of the Plaintiff in Error in its brief, that Chapters 19 and 72 of the Acts of the Twenty-ninth Legislature of Texas are as applied to it void, and that having paid the taxes prescribed by those Acts to the Secretary of State, under protest, it is entitled to recover the amount back, and that the Court of Civil Appeals of Texas erred in holding that the payment was a voluntary one. There is no assignment of error either in the record or in Plaintiff in Error's brief on this point, but even if error had been properly assigned upon it, we think it is clear under the facts in this case and the authorities that the payment of the tax in question was purely voluntary and that even though improperly demanded, it can not be recovered. At the time of the payment of the tax the Plaintiff in Error filed a protest with the Secretary of State as follows:

“We beg to advise you that we pay this tax under protest, on the ground that the franchise law of your State is in violation of the Constitution of the State of Texas, and also the Constitution of the United States, and it is therefore void. We reserve the right to recover back the amount of taxes we have paid in the event that it shall be decided that the law is unconstitutional.”

The demand for the payment of the tax was not made of Plaintiff in Error for doing an interstate business,

but for doing business purely local within the State. The Plaintiff in Error pleaded in its petition in this case that it was not in fact doing business within the State, but this was not urged in the protest and seems not to have been within the contemplation either of the Secretary of State or of the Plaintiff in Error at the time of the demand for and the payment of the money. Under these conditions we think it is clear, as was held by the Court of Civil Appeals of Texas in this case, that, if Plaintiff in Error was doing only an interstate business as pleaded and contended by it, then a forfeiture of its permit could in no wise affect it because its right to do an interstate business without first obtaining a permit is unquestioned.

See *Allen vs. Tyson-Jones Buggy Co.*, 91 Tex., 22; *Miller vs. Goodman*, 91 Texas, 41; *Lassiter vs. Mill & Elevator Co.*, 22 Texas Civ. App., 33, 54 S. W., 425.

So that it appears that the payment of the tax was not made under any immediate or urgent necessity therefor. The rule on the subject of a voluntary payment of taxes is clearly stated in *Dillon on Municipal Corporations*, Vol. 2, page 947, as follows:

“Where a party pays an illegal demand with the full knowledge of all the facts which render such demand illegal, without an immediate and urgent necessity therefor, or unless to release his person or property from detention, or to prevent an immediate seizure of his person or property, such payment must be deemed to be voluntary, and can not be recovered back; and the fact that the party at the time of making the payment, files a written protest does not make the payment involuntary.”

We think that the Court of Civil Appeals of Texas was clearly right in this case in its holding that the payment of the taxes in question was not under compulsion or duress, so that even if it were held to be unlawfully imposed and exacted, which we have already attempted to show was not the case, it was not recoverable.

See *Lamborn vs. County Commissioners*, 97 U. S., 181; *Railroad Co. vs. Commissioners*, 98 U. S., 542; *Little vs. Bowers*, 134 U. S., 554, and other authorities cited in the opinion of the Court of Civil Appeals of Texas in this case. (115 S. W. 364.)

Believing that there was no error in the judgment of the Court below, we ask that this cause be affirmed.

JEWEL P. LIGHTFOOT,  
Attorney General.

JAMES D. WALTHALL,  
Assistant Attorney General.  
*Attorneys for Defendant in Error.*

## LAWS QUESTIONED.

At the time the Plaintiff in Error took out a permit to do business in 1901, the laws of the State of Texas requiring foreign corporations to comply with the laws of the State, were as follows:

### CHAPTER 119—LAWS OF 1897.

Article 745. Hereafter, any corporation for pecuniary profit except as hereinafter provided, organized or created under the laws of any other State or of any territory of the United States, or of any municipality of such State or Territory, or of any foreign government, sovereignty or municipality, desiring to transact business in this State, or solicit business in this State, or establish a general or special office in this State, shall be and the same is hereby required to file with the Secretary of State a duly certified copy of its articles of incorporation, and thereupon the Secretary of State shall issue to such corporation a permit to transact business in this State. If such corporation is created for more than one purpose, the permit may be limited to one or more purposes and such corporation on obtaining such permit shall have and enjoy all the rights and privileges conferred by the laws of this State on corporations organized under the laws of this State, and shall be authorized and empowered to hold, purchase, sell, mortgage or otherwise convey such real estate and personal estate as the purposes of such corporation may require, and also, to take, hold and convey such other property, real, personal or mixed, as may be requisite for such corporation to acquire in order to obtain or secure the payment of any indebtedness or liability due, or which may become

due, or belonging to the corporation; provided that if such corporation so obtaining a permit to do business in this State, shall acquire any real estate under the powers hereby conferred, it shall alienate all real property so acquired by it not necessary for the purposes of such corporation, within fifteen years from the time of acquisition; and provided, further, that such corporation shall alienate all real estate acquired by it for the purposes of such corporation, within fifteen years from the expiration of the time for which the permit is issued, or if such permit be renewed, or such corporation be otherwise authorized to carry on business in this State, then such corporation shall alienate such real estate within fifteen years after the expiration of the time for which such permit is extended, or it is so authorized to carry on business in this State; and provided further that if such corporation shall cease to carry on business in this State, that it shall alienate all such real estate so acquired by it, within fifteen years after the time it shall so cease to carry on business in this State.

"Art. 746. No such corporation can maintain any suit or action, either legal or equitable, in any of the courts of this State upon any demand, whether arising out of contract or tort unless at the time such contract was made or tort committed the corporation had filed its articles of incorporation under the provisions of this chapter in the office of the Secretary of State for the purpose of procuring its permit.

"Art. 747. The provisions of this chapter shall not apply to corporations created for the purpose of constructing, building, operating or maintaining any railway, or to such corporations as are required by law to procure permits to do business from the Commissioner of Agriculture, Insurance, Statistics or History.

"Art. 748. No permit shall be issued for a longer period than ten years from the date of filing such articles of incorporation in the office of the Secretary of State.

"Art. 749. Either the original permit or certified copies thereof by the Secretary of State shall be evidence of the compliance on the part of any corporation with the terms of this chapter. A certificate of the Secretary of State to the effect that the corporation named therein has failed to file in his office its articles of incorporation shall be evidence that such corporation has in no particular complied with the requirements of this chapter."

Also Chapter 120 of the Laws of 1897, as to the payment of fees, in force in 1901, which is as follows:

"Section 1. Be it enacted by the Legislature of the State of Texas: That Articles 5243i, 5243j, and 5243k, of an Act entitled 'An Act to amend Articles 5243e, 5243i, 5243j, and 5243k, of Chapter 9, Title 104, of the Revised Civil Statutes relating to the taxation of insurance, telephone, sleeping and dining car and other corporations, and to provide for forfeiting the charters of domestic corporations, and permits of foreign corporations to do business in this State for failure to pay the franchise tax levied by this act, and to define and describe the notice to be given to said corporations previous to such forfeiture, and to provide adequate penalties for a violation of this act,' passed at the present session and approved April 30, 1897, be and the same is hereby amended so as hereafter to read as follows:

"Article 5243i. Each and every private domestic corporation heretofore chartered under the laws of this State shall pay to the Secretary of State an annual franchise tax of ten dollars on or before the

first day of May of each year; and every such corporation which shall be hereafter chartered under the laws of this State shall also pay to the Secretary of State an annual franchise tax of ten dollars, the tax for the first year to be paid at the time such charter is filed, and the Secretary of State shall not be required or permitted to file such charter until such tax is paid, and each succeeding tax shall be paid on or before the first day of May of each year thereafter; provided, that any such corporation having an authorized capital stock of over fifty thousand dollars and less than a hundred thousand dollars, shall pay an annual franchise tax of twenty dollars; and every such corporation having an authorized capital stock of one hundred thousand dollars and less than two hundred thousand dollars, shall pay an annual franchise tax of thirty dollars; and every such corporation having an authorized capital stock of two hundred thousand dollars or more shall pay an annual franchise tax of fifty dollars.

“Each and every foreign corporation heretofore authorized to do business in this State under the laws of this State shall, on or before the first day of May of each year, and each and every such corporation shall hereafter be so authorized to do business in this State, shall, at the time so authorized, and on or before the first day of May of each year thereafter, pay to the Secretary of State the following franchise tax: Every such corporation having an authorized capital stock of twenty-five thousand dollars or less, an annual franchise tax of twenty-five dollars; every such corporation having an authorized capital stock of more than twenty-five thousand dollars and not exceeding one hundred thousand dollars, an annual fran-

chise tax of one hundred dollars; every such corporation having an authorized capital stock of over one hundred thousand dollars, an annual franchise tax of one hundred dollars, and in addition thereto an annual franchise tax of one dollar for every ten thousand dollars of authorized capital stock over and above one hundred thousand dollars, and not exceeding one million dollars; and if such authorized capital stock exceeds one million dollars, then such corporation shall pay a still further additional tax of one dollar for every one hundred thousand dollars over and above one million dollars. Any corporation, either domestic or foreign, which shall fail to pay the tax provided for in this article at the time specified herein, shall, because of such failure, forfeit its right to do business in this State, which forfeiture shall be consummated, without judicial ascertainment, by the Secretary of State, entering upon the margin of the ledger kept in his office relating to such corporations the word 'Forfeited,' giving the date of such forfeiture, and any corporation whose right to do business may be thus forfeited shall be denied the right to sue or defend in any of the courts of this State, and in any suit against such corporation on a cause of action arising before such forfeiture, no affirmative relief may be granted to such defendant corporation, unless its right to do business is revived as provided in Article 6243j of this Act. All transportation companies now paying an annual income tax on their gross receipts in this State shall be exempted from the franchise tax above imposed.

"Art. 5243j. The Secretary of State shall on or before the first day of March of each year notify all private, domestic and foreign corporations sub-

ject to a franchise tax by any law of this State by mailing to the postoffice named as the principal place of business of such corporation in its articles of incorporation, or to any other place of business of such corporation, addressed in its corporate name, a written or printed notice that such tax will be due at a date named therein, a record of the date of which mailing must be kept by said officer, and which mailing of such notice and the said record thereof shall constitute legal and sufficient notice for all the purposes of this act; and in thirty days after the first day of May of each year, said officer shall publish for ten consecutive days in some daily newspaper published in the State, a list of the corporations whose right to do business in this State has been forfeited for non-compliance with this act; provided, that any corporation which shall within six months after such publication pay the tax and (\$5) five dollars additional thereto, for each month or fractional part of a month which shall elapse after such forfeiture, shall be relieved from the forfeiture of its right to do business by reason of such failure, and when such tax and the said penalty are fully paid to the Secretary of State it shall be the duty of said officer to revive and reinstate said right to do business by erasing or cancelling the word 'Forfeited' from his ledger, and substituting therefor the word 'Revived,' giving the date of such revival; providing further, that this chapter shall not be construed to repeal any law prescribing fees to be collected by the Secretary of State. \* \* \*

"Section 2. The fact that the close of the session is rapidly approaching, and the further fact that the State is greatly in need of revenue, and in order to remove any doubt of the proper construction of the ar-

ticles hereby amended, creates an emergency and an imperative public necessity exists that the constitutional rule requiring bills to be read on three several days be suspended, and that this act take effect from and after its passage, and it is so enacted."

Prior to the payment of the taxes which are sought to be recovered there was no change in Sections 745 to 749, but in 1905 there was a change or an amendment which increased the burdens and which is known as chapters 19 and 72 of the laws of 1905, and which are as follows:

#### "CHAPTER 19.

"Section 1. Be it enacted by the Legislature of the State of Texas: That Articles 5243i and 5243j of an Act entitled 'An Act to amend Articles 5243i, 5243j and 5243k of an Act entitled 'An Act to amend Articles 5243e, 5243i, 5243j and 5243k, of Chapter 9, Title 104, of the Revised Civil Statutes relating to the taxation of insurance, telephone, sleeping and dining car and other corporations, and to provide for forfeiting the charters of domestic corporations and permits of foreign corporations to do business in this State, for failure to pay the franchise tax levied by this act, and to define and prescribe the notice to be given to said corporations previous to said forfeiture, and to provide adequate penalties for a violation of this Act,' passed at the present session, and approved April 30th, 1897, said Act being Chapter 120 of the General Laws of the State of Texas, passed at the regular session of the Twenty-fifth Legislature, be amended so as to hereafter read as follows:

“Article 5243i. Each and every private, domestic corporation heretofore chartered, or that may hereafter be chartered, under the laws of this State shall, on or before the first day of May of each year, pay to the Secretary of State the following franchise tax for the year following, to wit: One dollar on each two thousand dollars or fractional part thereof of the authorized capital stock of the corporation up to and including one hundred thousand dollars, and one dollar on each ten thousand dollars or fractional part thereof of such stock in excess of one hundred thousand dollars and up to and including one million dollars; and one dollar on each twenty thousand dollars or fractional part thereof of such stock in excess of one million dollars, and up to and including ten million dollars; and one dollar for each fifty thousand dollars or fractional part thereof of such stock in excess of ten million dollars; but such tax shall not be less than ten dollars in any case. And each and every foreign corporation heretofore authorized or that may hereafter be authorized to do business in this State, shall, on or before the first day of May of each year, pay to the Secretary of State the following franchise tax for the year following, to wit: One dollar on each one thousand dollars or fractional part thereof of the authorized capital stock of the corporation up to and including one hundred thousand dollars; and one dollar on each five thousand dollars or fractional part thereof of such stock in excess of one hundred thousand dollars, and up to and including one million dollars; and one dollar on each twenty thousand dollars or fractional part thereof of such stock in excess of one million dollars, and up to and including ten million dollars; and one dollar

on each fifty thousand dollars of such stock in excess of ten million dollars; but such tax shall not be less than twenty-five dollars in any case. Whenever a corporation is chartered or authorized to do business in this State it shall pay the proportional part of such annual franchise tax corresponding to the length of time before the next following first day of May, and if such tax be not then paid, no such charter shall be filed or permit issued. The franchise tax herein provided for shall be computed upon the basis of the total amount of the capital stock issued and outstanding, plus the surplus and undivided profits of the corporations, instead of upon the authorized capital stock, whenever such total amount is different from the authorized capital stock. Affidavit of the head of the corporation and secretary thereof to these facts may be filed with the Secretary of State, or may be required whenever in his judgement the same is necessary to protect the interests of the State. Any corporation, either domestic or foreign, which shall fail to pay the tax provided for in this article at the time specified herein shall immediately become liable to a penalty of twenty-five per cent on the amount of the tax due by it, and if the amount of said tax and penalty be not paid in full on or before the first day of July thereafter, such corporation shall, for such default, forfeit its right to do business in the State, which forfeiture shall be consummated without judicial ascertainment, by the Secretary of State, entering upon the margin of the ledger kept in his office relating to such corporation the word 'Forfeited,' giving the date of such forfeiture; and any corporation whose right to do business may be thus forfeited

shall be denied the right to sue or defend in any of the courts of this State, and in any suit against such corporation on a cause of action arising before such forfeiture, no affirmative relief may be granted to such corporation unless its right to do business is revived, as provided in Article 5243j. All insurance, surety, guaranty and fidelity companies, all transportation companies, and all sleeping, palace and dining car companies now paying an annual income tax on their gross receipts in this State shall be exempted from the franchise tax above imposed.

“Art. 5243j. The Secretary of the State shall, during the month of May of each year, notify each private, domestic and foreign corporation subject to a franchise tax under any law of this State, which has failed to pay such tax on or before the first day of May, that unless such defaulted tax, together with the penalty thereon, be paid on or before the first day of July following, its right to do business in the State will be forfeited without judicial ascertainment. Such notice may be either written or printed, and shall be mailed to the postoffice named in its articles of incorporation as the principal place of business of such corporation, or to any other known place of business of such corporation, addressed in its corporate name, and a record of the date of mailing shall be kept by the Secretary of State. Such notice and the said record thereof shall constitute legal and sufficient notice for all the purposes of this act. Any corporation whose right to do business may have been thus forfeited shall be relieved from such forfeiture by paying to the Secretary of State, at any time within six months after its forfeiture, the full amount of the franchise tax and penalty due by it, together with an additional amount of five per cent of such tax (in no

case to be less than five dollars), for each month or fractional part of a month which shall elapse after such forfeiture. When such tax and all such penalties are fully paid to the Secretary of State, he shall revive and reinstate the right of the corporation to do business, by canceling the word 'Forfeited' from his ledger and substituting therefor the word 'Revived,' giving the date of such revival. But nothing in this act shall be construed to repeal any law prescribing fees to be collected by the Secretary of State, provided the provisions of this act shall not apply to corporations having no capital stock organized for the exclusive purpose of promoting the public interest of any city or town.

"Sec. 2. The near approach of the time (March 1) on or before which, by existing law, notices of the franchise tax must be sent out and the growing deficit in the State Treasury, create an imperative public necessity for the suspension of the constitutional rule requiring bills to be read on three several days, and an emergency demanding that this act take effect and be in force from and after its passage, and it is so enacted."

## CHAPTER 72—LAWS 1905.

"Section 1. Be it enacted by the Legislature of the State of Texas: That the annual franchise tax payable to the State by private domestic corporations heretofore chartered or that may hereafter be chartered under the laws of this State, and foreign corporations heretofore authorized, or that may hereafter be authorized to do business in this State, shall be computed upon the basis of the authorized capital stock of the corporation, as stated in its articles of incorporation, or certified copy thereof, unless the aggregate amount of the capital

stock issued, plus the surplus and undivided profits of the corporation exceeds the authorized capital stock, in which case the franchise tax shall be computed upon the basis of such aggregate amount. For the purpose of making such computations, the Secretary of State is authorized to require affidavits of the president, secretary, treasurer and other officers of any such corporation to show the amount of its capital stock issued and its surplus and undivided profits, whenever in his judgment the same may be necessary, or he may ascertain such facts from other sources. Should an officer of any corporation subject to the payment of an annual franchise tax, fail or refuse to give under oath full and accurate information of the amount of the capital stock issued by the corporation, or of the amount of its surplus or undivided profits, when required so to do by the Secretary of State, he shall be deemed guilty of misdemeanor, and upon conviction shall be fined in any sum not more than five hundred dollars.

"Sec. 2. That all laws and parts of laws in conflict with the provision of this act be and the same are hereby repealed, insofar as they conflict herewith.

"Sec. 3. The near approach of the time (May 1) on or before which the franchise tax due and payable by corporation must be paid, and the growing deficit in the State Treasury, create an imperative public necessity for the suspension of the constitutional rule requiring bills to be read on three several days, and an emergency demanding that this act take effect and be in force from and after its passage, and it is so enacted."

OPINION OF COURT OF CIVIL APPEALS OF  
TEXAS.

Gaar, Scott & Co. vs. Shannon, Secretary of State.

(Court of Civil Appeals of Texas, December 16, 1908; rehearing denied January 20, 1909. 115 S. W. Rep., 361.

RICE, J. — Appellant instituted this suit against appellee individually, to recover the sum of \$575 with interest thereon, \$287 of which was alleged to have been paid by it to him as Secretary of State on or about the 28th day of April, 1905, and \$288 of which was paid to him as Secretary of State on April 30, 1906, which said amounts were paid as a franchise tax, claimed to be due from it to the State by virtue of Acts Twenty-ninth Legislature, 1905, pages 21, 100. cc. 19, 72, for said years. The suit was predicated on the contention that said acts of the Legislature under which the tax was collected were and are unconstitutional and void. After all formal requisites were stated, the petition alleged, substantially that the State in 1901 granted it a permit under the then existing law to transact business within the State for a period of ten years, and that it paid the franchise tax then imposed for said privilege; that thereafter, in the years of 1905 and 1906, the Secretary of State, by virtue of the Acts of the Twenty-ninth Legislature, heretofore mentioned, demanded and received from appellant the amount sued for as a franchise tax for said years; that said tax was so paid by it under written protest, on the ground that said law was unconstitutional and void, but the points relied upon were not set forth in said protest. The petition, however, asserts the invalidity of said law, chiefly upon the following grounds, viz.: That, having been granted a permit un-

der the law of 1901 for a period of ten years, and having paid the tax therefor, the Legislature had no authority by a subsequent act to impose an additional tax, and to do so would be violative of the provisions of both the State and Federal Constitutions, which forbids any State to pass any law impairing the obligation of contracts. It further alleged that said law imposed a greater burden upon foreign than upon domestic corporations, and was therefore an unjust discrimination as against it in favor of domestic corporations; that the same was an Indiana Corporation, doing wholly an interstate business, and was, therefore, not subject to the payment of the franchise tax and was not required to obtain a permit, and to demand the same would be in violation of law. There were other allegations under which it is claimed that said franchise tax was illegal, which we deem unnecessary to set out. A general demurrer to this petition being sustained by the court, appellants excepted, and gave notice of appeal, so that the only question for our consideration is as to the correctness of the judgment of the trial court sustaining said demurrer.

By its third assignment of error appellant insists that the court erred in sustaining the general demurrer to its petition, because it appeared therefrom that the franchise laws of the State of Texas were unconstitutional and void, being in contravention of the Constitution of the United States and of this State. By its first proposition thereunder it is insisted that said acts impair the obligation of the contract entered into between the State and plaintiff on the 23rd day of May, 1901. The act of the Legislature under consideration provided for the payment by every foreign corporation heretofore authorized or thereafter authorized to do business in this

State of a certain franchise tax, based upon the authorized capital stock of such corporation, providing the time for its payment, and prescribing a penalty of 25 per cent on the amount of the taxes due for failure to pay the same, as well as forfeiture of right to do business in the State, and directing the Secretary of State to declare such forfeiture without judicial ascertainment, by entering the same upon a ledger to be kept in his office, relating to such corporations. Section 1, c. 19, pp. 21-23, Acts 29th Leg., 1905. And by an amendment thereto, Section 1, c. 72, page 100, Acts of the Twenty-ninth Legislature, 1905, it was further provided that it should be a misdemeanor on the part of the officers of said corporations subject to the payment of such franchise tax, to fail to give under oath accurate information as to the amount of its capital stock, when demanded by said Secretary of State. There was a somewhat similar provision in the Revised Statutes in force in 1901 (Rev. St. 1895, Art. 2243i), relative to the right of granting permits to foreign corporations to do business within this State, but the amount of such tax was increased by the Acts of the Twenty-ninth Legislature. Laws 1905, p. 22, c. 19, Sec. 1.

We do not think that because a permit was granted to appellant under a former law, the State would be thereby precluded from passing any further franchise tax upon the same subject, even though it changed the conditions and imposed a greater tax than the former law. At the time that said permit was first granted our statute (Rev. St. 1895, Art. 650), expressly provided that "all charters or amendments to charters under the provisions of this chapter shall be subject to the power of the Legislature to alter, reform or amend the same." And while this act might be regarded as applicable alone

to domestic corporations, there seems to be no good reason why this should not be held to be the law in the absence of such a statute, because it has been held that, unless the grant of a franchise to a foreign corporation expressly exempted it from a license taxation, the imposition of such tax is not invalid, and does not impair the obligation of any contract, and that no corporation could claim an immunity from taxation or from license because it paid a consideration for its charter or franchise, in the absence of a stipulation on the part of the State or other taxing power that the bonus was received in lieu of any further or future taxation. Even a provision in a charter fixing a specified sum to be paid as taxes, but not providing that such sum shall be in lieu of other taxes, is not a contract that no greater tax shall be laid. *New Orleans City R. R. Co. vs. New Orleans*, 143 U. S., 192, 12 Sup. Ct., 403, 36 L. Ed., 121; *Delaware R. R. Tax vs. P. W. & B. R. R. Co.*, 18 Wall., 206, 21 L. Ed., 888; *Ry. Co. vs. Philadelphia*, 101 U. S., 528, 25 L. Ed., 912; *Citizens' Savings Bank vs. Owensborough*, 173 U. S., 636, 19 Sup. Ct., 530, 571, 43 L. Ed., 840; *Covington vs. Kentucky*, 173 U. S., 231, 19 Sup. St. 383, 43 L. Ed., 679; *Louisville Water Co. vs. Clark*, 143 U. S., 1, 12 Sup. Ct., 346, 36 L. Ed., 55; *Wyandotte vs. Corrigan*, 35 Kan., 21, 10 Pac., 99; *Gray on Limitations of Taxing Power*, pars. 1001-1008; *Murfree on Foreign Corporations*, pars. 34-36. Besides this, our State Constitution provides "that the power to tax corporations and corporate property shall not be surrendered or suspended by act of the Legislature by any contract or grant to which the State shall be a party" (Article 8, Sec. 4), which was in force when appellant secured its permit. We, therefore, hold that, notwithstanding a former permit had been granted, the

inherent power remained in the State to change or amend the law at any time thereafter, even to the extent of levying an additional burden for the permission granted to foreign corporations to do business within the State, and that such change of the law would not be in violation of the Constitution prohibiting the passage of any act impairing the obligation of contracts.

By its eleventh proposition under this assignment appellant urges that the tax in question was a property tax, and by its twelfth that fees paid to the Secretary of State for obtaining a permit for incorporation are not taxes, and by its thirteenth that graduated taxes are illegal, and, therefore, that the acts of the Legislature under consideration are in violation of the Constitution of the State. Appellee, on the other hand, insists that the tax in question is not a property tax, but is a privilege or license tax, and is therefore in no respect invalid or illegal. It is well settled that a State has the absolute right to exclude or permit foreign corporations from doing business within its boundaries, and that it is an overt act of comity or grace on its part to permit their coming in at all, and it has the right to impose such conditions as it may see proper in granting said permission. In *Beale on Foreign Corporations*, Sec. 508, it is said: "The granting of such right or privilege rests entirely within the discretion of the State, and of course when granted may be accompanied with such conditions as its Legislature may judge most befitting to its interest and policy. It may require, as a condition of the granting of the privilege, and also of its continued exercise, that the corporation pay a specified sum to the State each year or month, or a specified portion of its gross receipts or of the profits of its business, or a sum to be ascertained in any convenient mode which it may pre-

scribe. The validity of the tax can in no way be dependent upon the mode which the State may deem fit to adopt in fixing the amount for any year, which it will exact for the franchise. No constitutional objection lies in the way of a legislative body prescribing any mode of measurement to determine the amount it will charge for the privilege it bestows." It is further said in the same section: "This tax is not a property tax, even when it is measured by the amount of property of a corporation. Therefore, to levy such a tax in addition to a property tax is not double taxation, and the tax is not subject to a constitutional requirement that the taxes shall be uniform." The same author (Section 509), continuing, says: "A State may, as has been seen, tax any privilege it grants. Such a tax, or rather license fee, is the payment exacted of a foreign corporation for the privilege of doing business within the State. Since a foreign corporation may be allowed to do business in a State upon conditions, the payment of a sum of money may be made a condition, and this may in form be the payment of a tax greater than, or different from, that paid by a domestic corporation. Such a tax is valid. It is not properly an exercise of the power to tax property, but is a license fee paid for the privilege of entering the State, and its validity is a necessary deduction from the right absolutely to exclude the foreign corporation." See also *Gray on Limitations of Taxing Powers*, pars. 54-57; *Home Ins. Co. vs. New York*, 134 U. S., 594, 10 Sup. Ct., 593, 33 L. Ed., 1025.

Taxes imposed on a foreign corporation as a condition of doing business generally in the State, not connected with the grant of any special privilege, is a license or privilege tax, and not a property tax, although the amount of it may be determined by the

capital stock of the corporation. A foreign corporation can only come into the State and do business there by the consent of the State, and the charge imposed by the State as the condition of that consent is not a tax on property. *Horn Silver Mining Co. v. New York*, 143 U. S., 305, 12 Sup. Ct., 403, 36 L. Ed. 164; *Murfree on Foreign Corporations*, par. 143. We think the quotations from the foregoing authorities amply establish the principle that the State has the authority to impose a franchise tax, and that the same is constitutional. We, therefore, overrule this assignment.

But it is insisted by appellant under another assignment that, since it appears from the allegations of its petition that it was doing an interstate business, therefore it was not subject to the franchise tax demanded of it, and hence the tax having been paid by it under protest, that it should be held to have the right to recover the same. In reply to this it might be said that the permit granted to it was for the purpose of allowing it to do business within the State, and that it was no fault on the part of the State that it failed to conduct a business therein in accordance with its permit. And the fact that it paid a franchise tax for this purpose could not affect the question if said franchise tax was legal, which we hold to be the case. The ground of the protest in this instance was not that the tax was illegal because of the fact that appellant was doing an interstate business, but for the reason alone, as stated in its protest, that the law itself imposing this franchise tax was unconstitutional and void. It, therefore, follows that if the law imposing the franchise tax is legal, appellant is in no position to com-

plain on this score; but it is insisted by appellee that the taxes sought to be collected were voluntarily paid, and therefore can not be recovered, even though illegally exacted. The rule on this subject seems to be clearly stated in *Dillon on Municipal Corporations*, Vol. 2, p. 947, as follows: "Where a party pays an illegal demand with the full knowledge of all the facts which renders such demand illegal, without an immediate and urgent necessity therefor, or unless to release his person or property from detention, or to prevent an immediate seizure of his person or property, such payment must be deemed to be voluntary, and can not be recovered back; and the fact that the party, at the time of making the payment, files a written protest does not make the payment involuntary." So that in the present case it can not be urged that the demand on the part of the officer that appellant should pay the tax for doing business within the State was an unlawful demand, because he clearly had the right to make such demand. The demand was not made for the payment of a tax for doing an interstate business, but for doing business within the State. This objection that it was not in fact doing business within the State was not then urged, and seems not to have been within the contemplation either of the Secretary of State or of appellant at the time of the demand for and the payment of the money. If appellant was doing an interstate business, as pleaded and contended for by it, then a forfeiture of its permit could in no wise affect it, because its right to do an interstate business without first obtaining a permit is unquestioned. *Allen vs. Tyson-Jones Buggy Co.*, 91 Texas, 22, 40 S. W. Rep., 393, 714;

Miller vs. Goodman, 91 Texas, 41, 40, S. W. Rep., 718; Lasater vs. Mill & Elevator Co., 22 Texas Civ. App., 33, 54 S. W. Rep., 425; Ry. Co. vs. Davis, 93 Texas, 378, 54 S. W. Rep., 381, 55 S. W. Rep., 562. So that the payment of the franchise tax in response to the demand by the Secretary of State was in our judgment a voluntary payment on the part of appellant, with a full knowledge of the facts. It was not made under compulsion or duress, so that, even if it were held to have been unlawfully imposed and exacted, which in our judgment was not the case, it is not recoverable. Houston vs. Feeser, 76 Texas, 365, 13 S. W. Rep., 266; Galveston City Co. vs. Galveston, 56 Texas, 494; Galveston Co. vs. Gorham, 49 Texas, 310; Lamborn vs. County Commissioners, 97 U. S., 181, 24 L. Ed., 926; Railroad Co. vs. Commissioners, 98 U. S., 542, 25 L. Ed., 196; Little vs. Bowers, 134 U. S., 554, 10 Sup. Ct., 620, 33 L. Ed., 1016; San Francisco N. B. Co. vs. Dinwiddie (C. C.), 13 Fed., 789; Wessel vs. Johnson Land Mortgage Co., 3 N. D., 160, 54 N. W. Rep., 922, 44 Am. St. Rep., 529; First National Bank vs. Mayor, 68 Ga., 119, 45 Am. Rep., 476; Peebles vs. City of Pittsburg, 101 Pa., 304, 47 Am. Rep., 714; McMillan vs. Richards, 9 Cal., 417, 70 Am. Dec., 655; Phelps vs. New York, 112 N. Y., 216, 19 N. E. Rep., 408, 2 L. R. A., 626; Phillips vs. Jefferson County, 5 aKn., 412; Wabunsee County vs. Walker, 8 Kan., 431; Robins vs. Latham, 134 Mo., 466, 36 S. W. Rep., 33; Sheldon vs. School District, 24 Conn., 88; 2 Cooley on Taxation, p. 1500; 2 Dillon on Municipal Corp., p. 947.

Again, it is urged that the tax imposed discriminated in favor of domestic corporations as against foreign. It will be observed that the tax is imposed

alike upon all foreign corporations. Acts 29th Leg., 1905, pp. 22, 100, cc. 19, 72. In Murfree on Foreign Corporations, par. 162, where other authorities on the same subject are collated, it is said: "A tax imposed upon foreign companies, but which does not apply to domestic corporations, is not for that reason obnoxious to the provisions of most of the State Constitutions requiring taxes to be equal and uniform. Since the effect of such legislation is simply to classify corporations and to impose certain taxes upon the class of foreign companies, and the classification being based upon legitimate distinctions, and the burden being equal within the class, there can be no question as to the validity of the tax. Nor could the provision as to equality and uniformity be applied to license taxes, for they are, in their very nature, the subject of governmental discretion." The tax so imposed being equal and alike upon all foreign corporations within the same class, we, therefore, think, can not be assailed merely upon the ground that a less tax is imposed upon domestic corporations; the effect of the act being simply to classify corporations and impose a like tax upon all within the same class, which under the law it seems the State has the clear right to do. We, therefore, overrule this contention.

It will be noticed that the petition in this case fails to allege that appellee had the money so collected from appellant in his possession at the time the suit was instituted. This being true, it is the opinion of the writer, however, not concurred in by the majority of the court, that the petition was insufficient on this ground and that the demurrer was for this reason also properly sustained; but the decision, of course, is not predicated upon this conclusion. In

the case of Hardesty v. Fleming, 57 Texas, 399, it was held that a suit might be brought against a tax collector to recover taxes illegally collected, if paid under protest, provided suit was brought before the money was paid over by the collecting officer; but in the case of Continental Land & Cattle Co. vs. Board, 80 Texas, 489, 16 S. W. Rep., 312, it is said: "A better rule is that the collecting officer is exempt from liability to the taxpayer, who should seek relief from the State, county or municipality on whose account the tax was collected." See also, on the same subject, Texas Land & Cattle Co. vs. Hemphill (Texas Civ. App.), 61 S. W. Rep., 333, where the same rule is announced.

The remaining assignments of error in our judgment are not well taken, and, without discussing them in detail, the same are overruled.

Believing that no error has been shown, the judgment of the trial court is affirmed.

GAAR, SCOTT & COMPANY *v.* SHANNON.

ERROR TO THE COURT OF CIVIL APPEALS FOR THE THIRD  
SUPREME JUDICIAL DISTRICT OF THE STATE OF TEXAS.

No. 88. Argued December 11, 1911.—Decided February 19, 1912.

Where the judgment of the state court rests on a matter of general law strong enough to sustain the judgment, this court cannot consider the Federal question involved; even if it were actually considered by the state court and determined adversely to plaintiff in error. *Hale v. Akers*, 152 U. S. 554.

Where a Federal question was properly presented and necessarily controls the determination of the case, this court has jurisdiction even if the decision is put by the state court upon some matter of local law. *West Chicago R. R. Co. v. Chicago*, 201 U. S. 506.

Neither a statute imposing a tax, execution thereunder, nor mere demand for payment, constitutes duress; but where the statute contains self-operating provisions by which non-payment of the tax results in severe penalties and forfeiture of right to do business, payment by one within the class affected is not voluntary but compulsory.

While a payment of the tax by one included in the class to which a statute applies in order to avoid penalties and forfeiture is compulsory, it is not so as to one not included in such class and payment thereof by such person is voluntary and not under duress.

Where the state court decides that a corporation which claims that it only does an interstate business but paid a state tax levied only upon corporations doing an intrastate business made the payment not under duress, and the record shows that the question was fairly in the case, the judgment rests upon a ground of general law broad enough to sustain it.

52 Tex. Civ. App. 644, affirmed.

In this suit against Shannon, Secretary of State for Texas, for the recovery of taxes paid under protest, the plaintiff, Gaar, Scott & Company, alleged that it is a corporation chartered by the laws of Indiana, in which State it has its principal place of business and where it manu-

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Statement of the Case.

factures machinery; that in 1901 it paid the amount of franchise tax required of foreign corporations, and obtained from the State of Texas a permit to do business for ten years. This permit, it alleges, was a contract which could not be impaired, but, notwithstanding that fact, the legislature, in 1905, passed an act requiring foreign companies doing business in Texas to pay a still higher franchise tax, measured by their capital and surplus, and provided that if the same was not paid by May 1st a penalty of twenty-five per cent should be added, and if not paid by July 1st the permit to do business in the State should be forfeited "without judicial ascertainment" and the company deprived of the right to sue in the courts. It alleged that the Secretary of State had mailed to the company a circular calling attention to the provisions of the act, and thereupon, and before May 1, 1905, and again before May 1, 1906, under the duress of this statute, the company had paid the tax demanded, under protest and with written notice that it reserved the right to sue for the recovery of the amount exacted by an unconstitutional law.

The petition alleges that plaintiff "*only transacts an interstate business in the State of Texas in the sale of its manufactured products.* That it employs at Dallas and Houston, Texas, agents who solicit and superintend the soliciting of orders for the goods manufactured by it at Richmond, Indiana, . . . and that this applies to all goods sold by your petitioner in the State of Texas, and your petitioner further alleges that it was at the time its permit was granted to it to do business in the State of Texas, . . . and that it now is and has been ever since said permit was granted to it engaged in an interstate commerce business."

The only prayer was for the recovery of the taxes paid for the years 1905 and 1906. The defendant's general demurrer was sustained. 52 Tex. Civ. App. 634.

*Mr. C. E. More*, with whom *Mr. Almon W. Bulkley* and *Mr. J. L. Patterson* were on the brief, for plaintiffs in error.

*Mr. James D. Walthall*, with whom *Mr. Jewell P. Lightfoot* was on the brief, for defendant in error.

MR. JUSTICE LAMAR, after making the foregoing statement, delivered the opinion of the court.

On writ of error to a judgment, sustaining defendant's demurrer to the complaint for the recovery of taxes paid under protest, the Court of Appeals of Texas considered all the assignments of error. It held that the permit of 1901, to do business for ten years, was not a contract and that therefore the State during that period might demand an increased or additional franchise tax. It ruled that foreign corporations might be altogether excluded, or required to pay a discriminatory tax as the condition of the right to do business in Texas. It further held that even if there had been merit in plaintiff's contention, it was not entitled to recover the taxes for 1905 and 1906, because they had been voluntarily paid.

1. If the record affords a basis for sustaining the last proposition, this court cannot consider whether the act violates the Fourteenth Amendment, or the commerce and contract clauses of the Constitution. For, as repeatedly ruled, where a state court has decided against the plaintiff in error on a matter of general law broad enough to sustain the judgment, this court will not consider the Federal questions, even though they may have been actually considered and determined adversely to his contention. *Hale v. Akers*, 132 U. S. 554, 564. The principle has been enforced in cases where the ruling of the state court was based on the application of the doctrine of *res adjudicata*, laches, statute of limitations, and others

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similar in kind to that involving the effect of a voluntary payment. *Northern Pacific R. R. Co. v. Ellis*, 144 U. S. 458; *Hale v. Lewis*, 181 U. S. 473; *Moran v. Horsky*, 178 U. S. 205; *Pierce v. Somerset Ry.*, 171 U. S. 641, 648; *Rector v. Ashley*, 6 Wall. 142.

It is, however, equally well settled that if the Federal question is properly presented and necessarily controls the determination of the case, the appellate jurisdiction of this court is not defeated because the decision is put upon some matter of local law. *West Chicago R. R. Co. v. Chicago*, 201 U. S. 506, 520. And the plaintiff in error insists that, under this rule, the constitutionality of the statute must be decided, because the facts stated in the complaint, and admitted by the demurrer, do not afford any basis for holding that the money was voluntarily paid.

2. Neither a statute imposing a tax, nor the execution thereunder, nor a mere demand for payment, is treated as duress. It does not necessarily follow that there will be a levy on goods. Or, if there is, the citizen, to avoid the consequences of the levy, may pay the money, regain the use of his property and maintain a suit for the recovery of what has been exacted from him. The legal remedy redresses the wrong. But he has the same right to sue if he pays under compulsion of a statute, whose self-executing provisions amount to duress. An act which declares that where the franchise tax is not paid by a given date a penalty of twenty-five per cent shall be incurred, the license of the company shall be cancelled, and the right to sue shall be lost, operates much more as duress, than a levy on a limited amount of property. Payment to avoid such consequences is not voluntary but compulsory, and may be recovered back. *Swift Co. v. United States*, 111 U. S. 22, 29; *Robertson v. Frank Brothers Co.*, 132 U. S. 17, 23; *Oceanic Navigation Co. v. Stranahan*, 214 U. S. 320, 329; *Atchison, Topeka & Santa Fe R. R.*

v. *O'Connor*, decided this day, *ante*, p. 280. Otherwise plaintiff might be without any remedy whatever. For in *Arkansas Building & Loan Assn. v. Madden*, 175 U. S. 269, it was held that a taxpayer was not entitled to an injunction, against the enforcement of a similar statute of the State of Texas, unless he could show that there was no adequate remedy at law. And, as payment under such an act was treated as compulsory, for which suit might be maintained, and as there was nothing to indicate inability of complainant to pay, or of the defendant to respond to a judgment, the bill was dismissed without prejudice. That necessarily recognized that the plaintiff had the right to pay under protest, sue the officer for the amount exacted and recover it back in case it should be made to appear that the statute was void.

3. If, therefore, the plaintiff had been included in the class to which this statute applied and, under the duress of its automatically enforced provisions, had paid the tax to avoid the disruption of its business, it could have maintained an action to recover the amount thus exacted. In that suit it would have been entitled to a decision on the question as to whether the statute was constitutional, and to a review of the judgment if it had been adverse to the company's contention. But the company did not, in any sense, come within the purview of the act. The plaintiff alleged that it was engaged only in interstate commerce. If so, the statute did not require from it the payment of the tax. For the Supreme Court of Texas in *Allen v. Tyson-Jones Buggy Co.*, 91 Texas, 22, and *Miller v. Goodman*, 91 Texas, 41, had held that the franchise tax act had no application to corporations doing an interstate business. The duress of its provisions, therefore, operated only on those doing intrastate business; and if the plaintiff, on a mere demand, paid the tax imposed by a statute, applicable only to other corporations, it had no more right to recover than would a drygoods merchant who voluntarily

paid a tax illegally imposed on those engaged in the selling of liquor.

To permit those not affected by a statute to pay the sum thereby assessed, and then sue for its recovery on the ground that the act was void, would reverse the rule that "one who would strike down a State statute as violative of the Federal Constitution must bring himself by proper averments and showing within the class as to whom the act thus attacked is unconstitutional. He must show that the alleged unconstitutional feature of the law injures him, and so operates as to deprive him of rights protected by the Federal Constitution." *Southern Railway Co. v. King*, 217 U. S. 524, 534.

What we have said shows that the question as to voluntary payment fairly arose out of the record, and was not arbitrarily injected into the case. *Leathe v. Thomas*, 207 U. S. 93, 99. A decision on that non-federal point could properly dispose of the plaintiff's suit to recover back what it had paid. The judgment of the Civil Court of Appeals must, therefore, be

*Affirmed.*

# TRANSCRIPT OF RECORD.

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1911.

No. 107.

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THE NEW MARSHALL ENGINE COMPANY AND FRANK  
J. MARSHALL, PLAINTIFFS IN ERROR.

THE MARSHALL ENGINE COMPANY, BY ANDREW VAN  
BLAHOOM, ITS RECEIVER.

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IN ERROR TO THE SUPERIOR COURT OF THE STATE OF  
MASSACHUSETTS.

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FILED JULY 21, 1909.

(21774.)

(21,774.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1911.

No. 107.

THE NEW MARSHALL ENGINE COMPANY AND FRANK  
J. MARSHALL, PLAINTIFFS IN ERROR,

v.s.

THE MARSHALL ENGINE COMPANY, BY ANDREW VAN  
BLARCOM, ITS RECEIVER.

IN ERROR TO THE SUPERIOR COURT OF THE STATE OF  
MASSACHUSETTS.

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a UNITED STATES OF AMERICA, ss:

[Seal of the Circuit Court, Massachusetts.]

The President of the United States to the Honorable the Judges of the Superior Court of the Commonwealth of Massachusetts, holden at Greenfield, within and for the County of Franklin, Greeting:

Because, in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Superior Court before you, or some of you, being the highest court of law or equity of the State of Massachusetts in which a decision could be had in the suit between The Marshall Engine Company, by Andrew Van Blarcom, its Receiver, Plaintiff and The New Marshall Engine Company and Frank J. Marshall, Defendants, in a bill in equity, wherein was drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision was against their validity, or wherein was drawn in question the validity of a statute of, or an authority exercised under, said State on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of such their validity; or wherein was drawn in question the construction of a clause of the Constitution, or of a treaty, or statute of, or commission held under, the United States, and the decision was against the title, right, privilege, or exemption, specially set up or claimed under such clause of the said Constitution, treaty, statute, or commission, a manifest error hath happened, to the great damage of the said The New Marshall Engine Company and Frank J. Marshall, as by their complaint appears.

We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court, at Washington, within thirty days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States should be done.

Witness, the Honorable Melville W. Fuller, Chief Justice of the United States, the twenty-fourth day of June, in the year of our Lord one thousand nine hundred and nine.

ALEX. H. TROWBRIDGE,  
*Clerk of the Circuit Court of the United States,  
District of Massachusetts,*  
By L. C. TUCKER, *Deputy Clerk.*

Allowed by  
JOHN A. AIKEN,  
*Chief Justice of the Superior Court.*

b COMMONWEALTH OF MASSACHUSETTS,

*Franklin, ss:*

And now, here, the Judges of the Superior Court of the Commonwealth of Massachusetts, make return of this writ by annexing hereto and sending herewith, under the seal of the said Superior Court, a true and attested copy of the record and proceedings in the suit within mentioned, with all things concerning the same, to the Supreme Court of the United States, as within commanded.

In Testimony Whereof, I Clifton L. Field, Clerk of said Superior Court have hereto set my hand and the seal of said Court this 17th day of July A. D. 1909.

[Seal the Superior Court.]

CLIFTON L. FIELD, *Clerk.*

1 COMMONWEALTH OF MASSACHUSETTS,

*Franklin, ss:*

To all persons to whom these presents shall come, Greeting:

Know ye, That among the Records of our Superior Court, sitting at Greenfield, in said County of Franklin for the hearing of all causes, matters and things cognizable by a Superior Court, between the second Monday of March, in the year one thousand nine hundred and nine, and the second Monday of July, in the same year, it is thus contained, the following being the entire record in the case:—

2 MARSHALL ENGINE COMPANY, a Corporation Duly Organized under the Laws of the State of New Jersey, by Andrew Van Blarcom, of Newark, in the County of Essex and State of New Jersey, its Receiver, Complainant in Equity,  
against

NEW MARSHALL ENGINE COMPANY, of Montague, in the County of Franklin and Commonwealth of Massachusetts, a Corporation Duly Organized under the Laws of said Commonwealth, and Frank J. Marshall, of Montague Aforesaid, Respondents.

The record of proceedings in the Superior Court being as follows, to wit:—

*Certificate of Clerk.*

COMMONWEALTH OF MASSACHUSETTS,

*Franklin, ss:*

Superior Court.

I, Clifton L. Field, clerk of the Superior Court for said county of Franklin, having by law the custody of the seal and all the records, books, documents, and papers of or appertaining to said court, hereby certify the papers hereto annexed to be true copies of papers appertaining to said court, and on file and of record in the office of said

court, to wit:—the bill of complaint, order of notice and return, restraining order and return, appearance, motion to take bill pro confesso, answer, motion for dissolution of injunction, appearance, replication, appearance, report of special master, with objections thereto, motion for confirmation of master's report, motion for attachment for contempt, motion to dismiss and order, notice of appeal, interlocutory decree in re attachment for contempt, motion for final decree and final decree, motion for find decree and final decree, disappearance, appearance, notice of appeal and appeal, rescript, final decree, decree in re attachment for contempt; also the docket entries.

In witness whereof I have hereunto set my hand and the seal of said court, this sixteenth day of July, in the year of our Lord one thousand nine hundred and nine.

[Seal of the Superior Court.]

CLIFTON L. FIELD, *Clerk.*

#### 4 *Bill of Complaint.*

In the Superior Court of the State of Massachusetts, County of Franklin.

THE MARSHALL ENGINE COMPANY, by ANDREW VAN BLARCOM, Its Receiver, Plaintiff,

vs.

THE NEW MARSHALL ENGINE COMPANY and FRANK J. MARSHALL, Defendants.

#### Complaint.

The Marshall Engine Company, by Andrew Van Blarcom, its Receiver, complains of the defendants and alleges:

1. That on or about the 13th day of September, 1902, the "Marshall Engine Company", the plaintiff herein, was duly incorporated under the laws of the State of New Jersey, with a capital stock of fifty thousand dollars (\$50,000), divided into five hundred shares of the par value of one hundred dollars (\$100) each. That of said capital stock fifty shares were preferred stock, and the balance, four hundred and fifty shares, were common stock. That the said "Marshall Engine Company" was organized for the purpose of manufacturing, repairing, buying, selling and otherwise dealing in and with a refining engine, known as the "Marshall Perfecting Engine", which said engine was the invention of one Frank J. Marshall, of the Town of Montague, Franklin County, Massachusetts, a defendant herein, from whom the said "Marshall Engine Company" was named, and by whom the said company was organized; and that it was the intention and purpose of the said "Marshall Engine Company" and of the said Frank J. Marshall, that the said "Marshall Engine Company" should acquire the good-will of the business carried on by the said Frank J. Marshall under the firm

name of "F. J. Marshall", together with the exclusive use of any words indicating that the business was carried on in succession or continuation thereof; trade marks and trade names connected therewith, and the entire right, title and interest in and to any and all of the inventions of the said Frank J. Marshall, in any way relative to or connected with, the said refining engine known as the "Marshall Perfecting Engine", and such Letters Patent of the United States as might be issued therefor.

II. That on or about the 21st day of June, 1905, the "New Marshall Engine Company", a defendant herein, was duly incorporated by the said Frank J. Marshall, under the Business Corporation Laws of the Commonwealth of Massachusetts, with a capital stock of fifty thousand dollars, (\$50,000), divided in five hundred shares of the par value of one hundred dollars (\$100) each. That of said capital stock fifty shares were preferred stock, and the  
6 balance, four hundred and fifty shares, were common stock. That the said "New Marshall Engine Company" as appears from its charter, was organized for the purpose of acquiring by purchase or otherwise, "Patent Number 725,349 of the United States of America, for a new and improved device in a refining engine known as the "Marshall Perfecting Engine", and to engage in the business of making, vending, filling and selling the devices and machines covered by the said "patent"; and that the said company has at all times since its incorporation maintained an office for the transaction of business in the Town of Montague, County of Franklin, State of Massachusetts.

III. That on or about the 13th day of June, 1905, the Court of Chancery, in the State of New Jersey, in an action wherein one Clarence M. Abbe, of Greenfield, Franklin County, Massachusetts, and one Fanny W. Abbe, of Greenfield, Franklin County, Massachusetts, were the complainants, and the said "Marshall Engine Company" was the defendant, made a decree appointing one Andrew Van Blarcom, of Newark, New Jersey, receiver of the said "Marshall Engine Company", an insolvent corporation, with full power to demand, sue for, collect, preserve, and take into his possession, all the property, effects and choses in action of the said "Marshall Engine Company", and enjoining and restraining the officers and agents of the said  
7 "Marshall Engine Company" from dealing in or interfering with the same; that the said Andrew Van Blarcom has duly and qualified and is such receiver.

IV. That on or about the 21st day of August, 1905, the Superior Court of the State of Massachusetts, in the County of Franklin, in an action wherein the said Fanny W. Abbe was a complainant, and the said "Marshall Engine Company" was the defendant, made a decree appointing the said Andrew Van Blarcom the receiver ancillary to the receiver appointed for the said "Marshall Engine Company" in the Court of Chancery, State of New Jersey, with full power to collect, get in and receive, the outstanding debts and moneys due to, or on account of the business of the said "Marshall Engine Company", and also to receive and take possession of, all the stock-in-trade, effects and property of every nature and kind, of or belonging to the said

"Marshall Engine Company" within the State of Massachusetts; that the said Andrew Van Blarcom has duly qualified and is such receiver.

V. And the plaintiff further shows, upon information and belief, that, at the time of the incorporation of the said "Marshall Engine Company", or prior thereto, the said "Marshall Engine Company", being in need of funds to carry on its business of manufacturing, buying, selling and otherwise dealing in and with a refining engine known as the "Marshall Perfecting Engine", which said business had been previously carried on by the said Frank J. Marshall, under the firm name of "F. J. Marshall," it was agreed by the said Frank J. Marshall with the said Clarence M. Abbe and Fanny W. Abbe, that they, said Clarence M. Abbe and Fanny W. Abbe, were to loan the said "Marshall Engine Company" from time to time, such sums of money as might be necessary to enable it to carry on its objects and business, and furthermore that they, the said Clarence M. Abbe and Fanny W. Abbe, were to purchase all or nearly all of the said fifty shares of preferred capital stock of the said "Marshall Engine Company", which said shares of capital stock were to be sold by the said "Marshall Engine Company", for the purpose of raising the necessary funds to carry on the objects and the business of the said "Marshall Engine Company", the said Frank J. Marshall agreeing with the said Clarence M. Abbe and Fanny W. Abbe to make the transfer of the property and rights hereinafter referred to, to the said "Marshall Engine Company".

VI. And the plaintiff further shows, upon information and belief, that in order to make the said fifty shares of the preferred capital stock of the said company salable, and to induce the said Clarence M. Abbe, and Fanny W. Abbe to purchase and pay for the same, and also to loan money to the said company, which purchase, payment, and loans would immediately greatly increase the value of the capital stock of the said "Marshall Engine Company", and would enable the business of the said company to be prosecuted to advantage, the said Frank J. Marshall, on or about the 15th day of September, 1902, in consideration of the issue to him by the said "Marshall Engine Company" of the said four hundred and fifty shares of the common capital stock of the said "Marshall Engine Company", duly assigned, by an instrument in writing, a copy of which is hereto annexed, and made a part hereof, marked Exhibit A, to the said "Marshall Engine Company", its successors and assigns, all his right, title and interest in and to "United States Letters Patent, No. 342,802 for an improvement in pulp-beating engines, issued to Frank J. Marshall, June 1st, 1886, and all improvements thereon and renewals of the same \* \* \* the good-will of the business carried on by the vendor under the firm name of "F. J. Marshall", the head office being located at 309 Broadway, New York City, together with the exclusive use of any words indicating that the business is carried on in succession or continuation thereof, and trade marks and trade names connected therewith; \* \* \* patents, \* \* \* implements and interests in which the vendor is entitled in connection with said business; \* \* \* also all other property and rights of whatsoever nature or

kind used by the vendor in its said business", and in and by the said assignment, the said Frank J. Marshall further covenanted and agreed with the said company, its successors and assigns, "to execute and do all such further assurances and things as shall reasonably be required by the company for vesting in it the property and rights agreed to be hereby sold, and giving to it the full benefit of this agreement", which said assignment was not recorded in the Patent Office of the United States at Washington, within three months from the execution thereof, owing to the willful carelessness and negligence of the said Frank J. Marshall.

VII. And the plaintiff further shows, upon information and belief, that on or about the second day of October, 1902, twenty shares of the preferred capital stock of the said "Marshall Engine Company" were duly issued by the said company to the said Clarence M. Abbe, for money advanced by the said Clarence M. Abbe to the said Company, in accordance with his agreement and understanding with the said Frank J. Marshall, as hereinbefore mentioned; that on or about the fifth day of October, 1903, twenty shares of the preferred capital stock of the said "Marshall Engine Company" were duly issued to the said Fanny W. Abbe, for money advanced by the said Fanny W. Abbe to the said company, in accordance with her agreement and understanding with the said Frank J. Marshall, as hereinbefore mentioned; that the said Clarence M. Abbe and the said Fanny W. Abbe each loaned large sums of money to the said company in accordance with their agreement and understanding with the said Frank J. Marshall, as hereinbefore mentioned; and that on or about the fifteenth day of September, 1902, the said "Marshall Engine Company," duly issued and delivered four hundred and fifty shares of its common capital stock to the said Frank J. Marshall and his nominees, in accordance with the terms and conditions of the assignment, hereinbefore referred to and marked Exhibit A.

VIII. And the plaintiff further shows, upon information and belief, that heretofore and before the first day of June, 1886, the said Frank J. Marshall had invented a certain new and useful improvement in refining engines, which had not previously been known or used by others, and was not in public use, or on sale with his consent or allowance; that the said Frank J. Marshall thereupon and on the twelfth day of February, 1886, made application in the form prescribed by law, praying that Letters Patent might be issued to him therefor, and did in other things comply with the statutes of the United States, in such case made and provided, and such proceedings were thereupon had that the United States of America did issue its Letters Patent under the seal of the Patent Office, Serial No. 342,802, and bearing date June 1st, 1886, whereby it granted, according to law, unto the said Frank J. Marshall, his heirs and assigns, the full and exclusive right and liberty of making, constructing, using and vending to others to be used, the said improvement in refining engines, a description whereof was annexed to and made a part of said Letters Patent, for the term of seventeen years from the date thereof, to which said Letters Patent, or a duly

certified copy thereof, now here, ready to be produced, the plaintiff begs to refer.

IX. And the plaintiff further shows, upon information and belief, that subsequent to the issuing of the said Letters Patent, first aforesaid, but prior to the fourteenth day of April, 1903, the said Frank J. Marshall had invented a certain further, new and useful improvement in refining engines, which was an improvement on the invention or improved refining engine described in the specifications attached to the said Letters Patent first aforesaid, which had not previously been known or used by others, and was not in public use or on sale, with his consent or allowance; that the said Frank J. Marshall thereupon and on the sixteenth day of July, 1902, made application in the form prescribed by law, praying that Letters Patent might be issued therefor, and did in other things comply with the statutes of the United States, in such case made and provided, and thereupon the United States of America did issue its Letters Patent, under the seal of the Patent office, Serial No. 725,349 and bearing date April 14th, 1903, whereby it granted, according to law, unto the said Frank J. Marshall, his heirs and assigns, the full and exclusive right and liberty of making, constructing, using, and vending

to others to be used, the said improvement in refining engines,  
13 a description whereof was annexed to and made a part of the said Letters Patent, for the term of seventeen years from the date thereof, to which said Letters Patent, or a certified copy thereof, now here, ready to be produced, the plaintiff begs to refer.

X. And the plaintiff further shows, upon information and belief, that on or about the eighth day of October, 1904, the said Frank J. Marshall, upon the request and at the cost of the said "Marshall Engine Company," and with the express intention and purpose of vesting absolutely in the said company, its successors and assigns, any and all patent rights and interests secured to the said company by the assignment hereinbefore referred to, marked Exhibit A, and more particularly speaking, any and all improvements at any time heretofore made by the said Frank J. Marshall upon the Letters Patent of the United States first aforesaid, and in and to, any and all inventions of the said Frank J. Marshall, in any way relative to or connected with, the said refining engine known as the "Marshall Perfecting Engine," and such Letters Patent of the United States as might be issued therefor, duly assigned, by an instrument in writing, a copy of which is hereto annexed and made a part hereof, marked Exhibit B, to the said "Marshall Engine Company," its successors and assigns, all his right, title and interest in and to "Letters Patent

of the United States of America, for an improvement in  
14 refining engines, which Letters Patent are numbered 342,802, and all further improvements thereon and renewals of the same," which said assignment was duly recorded in the Patent office of the United States, at Washington, on the tenth day of October, 1904.

XI. And the plaintiff further shows, upon information and belief, that the improvements, as made by the said Frank J. Marshall, and for which the Letters Patent last aforesaid were issued to him, were

improvements upon the said refining engine described in and secured to the said Frank J. Marshall, his heirs and assigns, by the Letters Patent first aforesaid, and assigned to the said "Marshall Engine Company" as aforesaid, and that the said "Marshall Engine Company," by virtue of the assignments aforesaid, has the exclusive right to make, construct, use and vend, such improvements and improved refining engine with- the United States of America, and is entitled to an assignment of the same for such territory in the usual form.

XII. And the plaintiff further shows, upon information and belief, that on or about the 22nd day of June, 1905, without the knowledge or consent of the said "Marshall Engine Company," the said Frank J. Marshall, in violation of his said agreement and understanding with the said "Marshall Engine Company" and the said Clarence M. Abbe and Fanny W. Abbe, assigned, by an instrument in writing, a copy of which is hereto annexed, and made a part hereof, marked Exhibit C, all his right, title and interest in and to, "Letters Patent of the United States" for a certain invention, being an improvement in Perfecting Engines, No. 725,349," to the said "New Marshall Engine Company," its successors and assigns, in consideration of the issue of four hundred and ninety-nine shares of its capital stock to the said Frank J. Marshall, or his nominees.

XIII. And the plaintiff further shows, upon information and belief, that the said "New Marshall Engine Company," without the knowledge or consent of the said "Marshall Engine Company," received and accepted the said written assignment of the said Patent, No. 725,349, with full and complete knowledge of the assignments hereinbefore referred to, made and executed by the said Frank J. Marshall to the said "Marshall Engine Company," and of the agreement and understanding by and between the said Frank J. Marshall and the said Clarence M. Abbe and Fanny W. Abbe, as hereinbefore mentioned.

XIV. And the plaintiff further shows, upon information and belief, that the said "New Marshall Engine Company" and the said Frank J. Marshall, have refused to transfer and assign said Letters Patent, No. 725349 to the said "Marshall Engine Company," and further shows, that it fears that the said "New Marshall Engine Company" or the said Frank J. Marshall, may encumber said Letters Patent, or convey the same or rights therein, to other persons, and that the said "Marshall Engine Company" will be irreparably injured by the making of any such encumbrance, of the said Letters Patent, or the granting of any rights thereunder, by the said "New Marshall Engine Company," or the said Frank J. Marshall.

Wherefore, the plaintiff prays, that the said "New Marshall Engine Company," its successors and assigns, or the said Frank J. Marshall, or both of them, as the case may require, their agents, attorneys and servants, and all persons acting or claiming under any of them, may be enjoined and restrained from assigning or disposing of any right, title or interest in or to the said Letters Patent, No. 725,349.

That the said "New Marshall Engine Company" its successors and assigns, or the said Frank J. Marshall, or both of them, as the case may require, and all persons claiming under any of them, may be compelled to execute and deliver to the said "Marshall Engine Company," an assignment in due form, so as to entitle the same to be recorded in the Patent Office of the United States, at Washington, of all its, his or their interest, in and to the said Letters Patent, No. 725,349, and the exclusive right to make, construct, use and vend to others to be used, the improvements and the improved refining engine in the United States of America.

That the said "New Marshall Engine Company," its successors and assigns, or the said Frank J. Marshall, or both of them, as the case may require, their agents, attorneys and servants, and all persons acting or claiming under any of them, may be enjoined and restrained from engaging in the business of making, vending, filling, selling and otherwise dealing in and with, the devices and machines covered by Patent No. 725,349 of the United States of America, for a new and improved device in refining engines known as the "Marshall Perfecting Engine," and that the plaintiff may have judgment for its costs in this action and such other, further or different relief in the premises as the nature of the case may require, and as shall be agreeable to equity and good conscience.

BOND & BABSON,  
*Attorneys for Plaintiff.*

27 Pine Street, Borough of Manhattan, New York City.

FREDERICK L. GREENE,  
*Of Counsel.*

Greenfield, Massachusetts.

18 STATE OF NEW JERSEY,  
*County of Essex, ss:*

Andrew Van Blarcom, of Newark, New Jersey, being duly sworn, says that he has read the foregoing petition subscribed by him, and knows the contents thereof, and that the same is true to his own knowledge, except as to the matters therein stated to be alleged on information and belief, and as to those matters he believes it to be true.

ANDREW VAN BLARCOM.

Sworn & subscribed before me this 21st day of October 1905.

[NOTARIAL SEAL.]

LESTER PACH,  
*Notary Public of N. J.*

## "EXHIBIT A."

## The Marshall Engine Company.

*Agreement for the Purchase of Property.*

An agreement made this 15th day of September, 1902, by and between F. J. Marshall (hereinafter called the "vendor"), of the first part, and "Marshall Engine Company" a corporation organized under the laws of New Jersey (hereinafter called the "company"), of the second part.

Whereas the vendor is the owner of the property and rights hereinafter described; and

Whereas the company has been duly organized with an authorized capital stock of \$50,000, divided into shares of the par value of \$100; and

Whereas the board of directors of the company have ascertained, adjudged and declared that the said property and rights are of the fair value of Forty-five Thousand dollars (\$45,000) and that the acquisition thereof is necessary for the business of the company and to carry out its contemplated objects.

Now therefore this agreement witnesseth:

1. That the vendor has sold, assigned, transferred and set over and does hereby sell, assign, transfer and set over unto the company, its successors and assigns, all his right, title and interest in and to the following described property, to wit:

United States Letters Patent, No. 342,802 for improvement in Engines issued to Frank J. Marshall June 1, 1886, and all improvements thereon and renewals of the same.

The good will of the business carried on by the vendor under the firm name of "F. J. Marshall," the head office being located at 309 Broadway, New York City, together with the exclusive use of any words, indicating that the business is carried on in succession or continuation thereof and trade marks and trade names connected therewith.

Also plants, machinery, office furniture, books of account and otherwise, patents, licenses, stock in trade, implements and interests in which the vendor is entitled in connection with such business.

Also all book or other debts owing to them and the full benefit of all security therefor.

Also all other property and rights of whatsoever nature or kind used by the vendor in its said business.

II. The company agrees, in consideration of said sale and upon the delivery of said property to it, to issue to the vendor and his nominees as hereinafter provided, and to such other nominees as the vendor shall in writing hereafter direct, at such times and in such amounts as they shall respectfully direct, certificates of stock of the company to the aggregate amount of four hundred and fifty shares, and said shares shall be deemed to be and are hereby declared to be full-paid shares and not liable to any further

call, and the holders of such stock shall not be liable to any further payment thereon.

III. Said stock shall be issued as follows:

To the vendor.	Shares.
F. J. Marshall.....	447
H. H. Picking.....	1
Wm. R. Roland.....	1
F. L. Miner.....	1

IV. The delivery of the certificates of said shares to the above named parties and their respective receipts for the same shall be a full discharge of each of the parties hereto to the extent thereof.

V. The vendor hereby covenants and agrees with the company, on the request and at the cost of the company, to execute and do all such further assurances and things as shall reasonably be required by the company for vesting in it the property and rights agreed to be hereby sold, and giving to it the full benefit of this agreement.

Witness the hand and seal of the vendor and the corporate seal of the company, attested by the signatures of its officers thereunto duly authorized, the day and year first above written.

F. J. MARSHALL  
MARSHALL ENGINE COMPANY,  
By FRANK R. SERLES, *President*.

[Corporate Seal.]

Attest:

WALTER H. BOND, *Sec'y*.

In presence of:—

C. M. ABBE.

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#### EXHIBIT B.

Whereas I, F. J. Marshall, of Turner's Falls, in the County of Franklin, State of Massachusetts, did obtain Letters Patent of the United States of America for an improvement in engines, which Letters Patent are numbered 342,802, and bear date the first day of June, in the year one thousand eight hundred and eighty-six; and

Whereas on the Fifteenth day of September, in the year One thousand nine hundred and two, for value received, I sold, assigned, transferred and set over unto Marshall Engine Company, a corporation of the State of New Jersey, all my right, title, and interest in and to said patent, and "all improvements thereon and renewals of the same"; and

Whereas said assignment was not recorded in the Patent Office within three months from the date thereof; and

Whereas by the terms and conditions of the aforesaid assignment I obligated myself "upon the request and at the cost of the company, to execute and do all such further assurances and things as shall

reasonably be required by the company for vesting in it the property and rights agreed to be hereby sold, and giving to it the full benefit of this agreement"; and

Whereas the said Marshall Engine Company has requested that a new assignment of said patent be made by me:

24 Now therefore, To all whom it may concern, be it known,

That in consideration of the sum of one dollar to me in hand paid, the receipt of which is hereby acknowledged, I, the said F. J. Marshall, have sold, assigned and transferred, and by these presents do sell, assign and transfer unto the said Marshall Engine Company, the whole right, title and interest in and to the said improvement in engines, and in and to the Letters Patent therefor aforesaid, and all further improvements thereon and renewals of the aforesaid patent: the same to be held and enjoyed by the said company for its own use and behoof, and for the use and behoof of its successors and assigns, to the full end of the term for which said Letters Patent are or may be granted, as fully and entirely as the same would have been held and enjoyed by me had no assignment been made.

In testimony whereof I have hereto set my hand and affixed my seal in the City of New York on the Eighth day of October, 1904.

F. J. MARSHALL.

In presence of:

JAMES P. FRANKLIN.

WALTER H. BOND.

STATE OF NEW YORK,

*County of New York, ss:*

On the eighth day of October in the year one thousand  
25 nine hundred and four, before me personally came F. J. Marshall to me known and known to me to be the same person described in and who executed the foregoing instrument and acknowledged to me that he executed the same.

WALTER H. BOND,

*Notary Public in and for the County of Kings, No. 242.*

Certificate filed in N. Y. Co.

Whereas: I, Frank J. Marshall, of Montague, County of Franklin and Commonwealth of Massachusetts have taken out and am the owner of Letters Patent of the United States for a certain invention, being an improvement in Perfecting Engines, Number 725,349.

And whereas New Marshall Engine Company, a corporation organized under the Laws of Massachusetts with a usual place of business at said Montague is desirous of acquiring the entire interest in the same:

Now, therefore, to all whom it may concern; Be it known, that for

and in consideration of the sum of one dollar to me in hand paid, and other good and valuable considerations the receipt of all which is hereby acknowledged, I the said Frank J. Marshall, do hereby sell, assign, transfer, and set over unto the said Marshall Engine Company, its successors and assigns, all the right, title, and interest, claim or demand, of any charter or description whatsoever, legal or equitable, which I have or may have in, to, under, or by virtue of the said invention, and Letters Patent, the same being the entire interest therein.

To be held and enjoyed by the said New Marshall Engine Company for its own use and behoof, and for the use and behoof of its successors and assigns to the full end of the term for which said Letters Patent are or may be granted, including any reissue, division, renewal, or extension thereof, as fully and entirely as the same would have been held and enjoyed by me had this assignment and sale not been made.

And I covenant to and with said assignee and its legal representatives, as follows; to wit,—

1. That I have full right to assign said Invention and Letters Patent, in manner and form as above written, and that the interest herein conveyed is free from all prior assignment, grant, mortgage, license, or other incumbrance whatever.

2. That no Letters Patent for the said Invention have been applied for by or granted to me or my legal representatives, or any other party with my knowledge and consent, in any country other than the United States, bearing date prior to the date of —.

3. That I have done nothing and will do nothing to impair the title herein conveyed, but will at any and all times co-operate with said assignee in asserting, maintaining, and defending the same, said assignee defraying all costs and charges, including reasonable compensation for time spent in this behalf, and all proper expenses thereby incurred.

4. That I will, whenever the legal counsel of said assignee or its legal representatives shall advise that a Reissue of said Letters Patent is lawful and desirable, sign all lawful papers, make all rightful oaths or affirmations, and do all legal acts necessary or expedient to the procurement of such reissue, without charge to said assignee but at my expense.

In Testimony whereof, I have hereunto set my hand and affixed my seal this 22nd day of June A. D. 1905.

FRANK J. MARSHALL. [SEAL.]

In presence of

MYRON B. ALLEN, *Witness*.

Recorded June 30, 1905.

Filed October 23, 1905.

Mr. Clerk:

Order of notice to issue returnable Oct. 28th inst. Court House Greenfield at 9 o'clock, A. M. to show cause etc. under the first and third prayers of the within bill.

Ad interim injunction to issue under first prayer and also to restrain from vending, selling or delivering under third prayer.

F. G. F., J. S. C.

Oct. 23rd, 1905.

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*Order of Notice.*

[L. S.]

COMMONWEALTH OF MASSACHUSETTS,

*Franklin, ss.:*

Superior Court.

To the New Marshall Engine Company, a Corporation Duly Established, of Montague, in said County, and Frank J. Marshall, of Montague Aforesaid, Greeting:

We command you to appear at the Court House, in Greenfield, in said County, on Saturday, the twenty-eighth day of October A. D. 1905, at nine o'clock in the forenoon, to show cause why a permanent injunction should not issue as prayed for in the first and third prayers of a bill of complaint which has been entered in our said Court at said Greenfield, by the Marshall Engine Company, a corporation established under the laws of the State of New Jersey, and having a usual place of business in Montague aforesaid, by Andrew Van Blarcom, its Receiver.

And to do and receive what our said Court shall consider in that behalf.

Witness, John A. Aiken, Esquire, Chief Justice of said Superior Court, at Greenfield, the twenty-third day of October, in the year of our Lord, one thousand nine hundred and five.

HAROLD H. FLOWER,

*Ass't Clerk.*

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*Officer's Return.*

FRANKLIN, ss.:

OCTOBER 24TH, 1905.

By virtue of this writ I have this day at forty minutes past Eight o'clock A. M. summoned the New Marshall Engine Company, to appear at Court as within directed by delivering in hand to Frank J. Marshall, Treasurer and officer having charge of its business for said Company a true and attested copy of this writ, and afterwards on the same 24th day of October 1905 I delivered to Frank J. Marshall in hand a true and attested copy of this writ for his appearance at Court as within directed.

CHESTER A. DAVIS,

*Deputy Sheriff.*

*Fees.*

2 services .50 .....	1.00
2 copies .50 .....	1.00
Travel .....	.40

**\$2.40**

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*Restraining Order.*

[L. s.]

COMMONWEALTH OF MASSACHUSETTS.

*Franklin, ss:*

To the New Marshall Engine Company, a Corporation Duly Established, of Montague, in said County, and Frank J. Marshall, of Montague Aforesaid, Their Agents, Attorneys and Counsellor, and Each and Every of Them, Greeting:

Whereas it has been represented unto us, in our Superior Court, by the Marshall Engine Company, a corporation duly established, of Montague aforesaid, by Andrew Van Blarcom, its Receiver, complainant, that it has filed in said Court a bill of complaint against the said New Marshall Engine Company, and you the said Frank J. Marshall respondents, wherein said complaint, among other things, prays that you the said respondents, be restrained from assigning or disposing of any right, title or interest in or to certain Letters Patent No. 725,349 mentioned in said bill of complaint; and also that you the said respondents, and all persons acting or claiming under either of you be restrained from vending, filling, selling and otherwise dealing in and with the devices and machines covered by Patent No. 725,349 of the United States of America, for a new and improved device in refining engines known as the "Marshall Perfecting Engine", and

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Whereas an order of notice has issued out of this Court returnable at the Court House, in Greenfield, in said County, on the twenty-eighth day of October A. D. 1905, to show cause why the prayers aforesaid should not be granted,

We, therefore, in consideration of the premises, do strictly enjoin and command you, the said respondents, and all and every the persons before named, in the meanwhile, to desist and refrain from assigning or disposing of any right, title or interest in or to said Letters Patent No. 725,349; we do also strictly enjoin and command you, the said respondents, and all and every the persons before named or referred to, in the mean while, to desist and refrain from vending, selling or delivering, the devices and machines covered by Patent No. 725,349 of the United States of America for a new and improved device in refining engines known as the "Marshall Perfecting Engine".

Witness John A. Aiken, Esquire, at Greenfield, the twenty-third day of October in the year of our Lord, one thousand nine hundred and five.

HAROLD H. FLOWER, *Ass't Clerk.*

33

*Officer's Return.*

FRANKLIN, ss:

OCTOBER 23, 1905.

By virtue of this writ I have this day at forty minutes past nine o'clock P. M. served the within order of notice upon the Turner's

Falls Machine Company by delivering in hand to D. P. Abercrombie, Treasurer a true and attested copy of this writ and afterwards on the 24th day of October 1905 at forty minutes past six o'clock A. M. by virtue of this writ I served the within order of notice upon the Turner's Falls Machine Company by delivering in hand a true and attested copy of this writ to James D. Coy clerk and officers having charge of its business for said Company, and afterwards on the same 24th day of October 1905 by virtue of this writ I served at forty minutes past eight o'clock A. M. the within order of notice upon the New Marshall Engine Company to appear at Court as within directed by delivering in hand to Frank J. Marshall, Treasurer and Officer having charge of its business for said Company a true and attested copy of this writ and afterwards on the same 24th day of October 1905, I delivered to Frank J. Marshall in hand, a true and attested copy of this writ for his appearance at Court as within directed.

CHESTER A. DAVIS,  
*Deputy Sheriff.*

*Fees.*

4 Services .50 .....	2.00
4 Copies .50 .....	2.00
Travel .....	.40
	<hr/>
	\$4.40

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*Appearance.*

FRANKLIN, ss:

Superior Court.

No. 2573.

MARSHALL ENGINE CO., by Receiver,  
vs.

FRANK J. MARSHALL et al.

OCT. 28TH, A. D. 1905.

Enter my appearance for the Defendants in the above action.

LYMAN W. GRISWOLD, *Attorney.*

Filed October 28, 1905.

*Motion to Take Bill Pro Confesso.*

FRANKLIN, ss:

Superior Court. In Equity.

MARSHALL ENGINE COMPANY, by Receiver,  
vs.  
NEW MARSHALL ENGINE COMPANY et al.

Showeth:

That your petitioner having exhibited a bill against the above named defendants on the 23rd day of October last, and order of notice having issued thereon returnable on the 28th day of October and said defendants having appeared on the said 28th day of October last, and said defendants not having put in their answers thereto within one month from said date of appearance, nor within one month from the return day of said order of notice:

35 Your petitioner prays that an order may be entered in said matter that the plaintiff's bill be taken pro confesso against the defendants.

GREENE & DAVENPORT,  
*Attorneys for Petitioner.*

Filed December 5, 1905.

*Defendants' Answer.*

COMMONWEALTH OF MASSACHUSETTS,  
*Franklin, ss:*

Superior Court.

MARSHALL ENGINE COMPANY, by ANDREW VAN BLARCOM, Receiver,  
vs.  
NEW MARSHALL ENGINE COMPANY et al.

*Defendants' Answer.*

DEC. 9, 1905.

1. The defendants admit the allegations contained in the first paragraph of the plaintiff's bill, except that the said Marshall Engine Company was organized for the purpose of manufacturing, repairing, buying and selling and otherwise dealing in and with a refining engine known as the Marshall Perfecting Engine and that it was the intention and purpose of the said Marshall Engine Company and said Frank J. Marshall that said Marshall Engine Company should acquire the good will of the business carried on by the said Frank J. Marshall under the name of "F. J. Marshall," together with the exclusive use of any words indicating that the business was carried on in succession or continuation thereof, trade marks and trade names connected therewith and the

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entire right, title and interest in and to any and all of the inventions of said Frank J. Marshall in any way relative to or connected with the said refining engine, known as the Marshall Perfecting Engine, and such letters patent of the United States as might be issued therefor, which they deny.

2. The defendants admit the allegations contained in the second paragraph of the plaintiff's bill.

3. The defendants admit the allegations contained in the third paragraph of the plaintiff's bill.

4. The defendants admit the allegations contained in the fourth paragraph of the plaintiff's bill.

5. The defendants deny the allegations contained in the fifth paragraph of the plaintiff's bill.

6. The defendants deny the allegations contained in the sixth paragraph of the plaintiff's bill.

7. The defendants deny the allegations contained in the seventh paragraph of the plaintiff's bill.

8. The defendants admit the allegations contained in the eighth paragraph of the plaintiff's bill.

9. The defendants deny the allegations contained in the ninth paragraph of the plaintiff's bill, except that the United States 37 of America did issue its Letters Patent under the seal of the Patent Office, Serial No. 725,349, bearing date of April 14th, 1903, as alleged which they admit.

10. As to the allegations contained in the tenth paragraph of the plaintiff's bill, the defendants neither affirm nor deny, but leave the plaintiff to prove the same.

11. The defendants deny the allegations contained in the eleventh paragraph of the plaintiff's bill.

12. The defendants deny the allegations contained in the twelfth paragraph of the plaintiff's bill, except that the said Frank J. Marshall assigned Letters Patent of the United States, No. 725,349 to the New Marshall Engine Company, which they admit.

13. The defendants deny the allegations contained in the thirteenth paragraph of the plaintiff's bill, except that the New Marshall Engine Company accepted said assignment of Letters Patent of the United States, No. 725,349.

14. As to the allegations contained in the fourteenth paragraph of the plaintiff's bill, the defendants neither affirm nor deny, but leave the plaintiff to prove the same.

NEW MARSHALL ENGINE CO.,  
FRANK J. MARSHALL,

By Their Attorney, LYMAN W. GRISWOLD.

After hearing, leave to file.

F. G. F., J. S. C.

Filed December 11, 1905.

38

*Motion for Dissolution of Injunction.*

FRANKLIN, ss:

Superior Court. In Equity.

ANDREW VAN BLARCOM, Receiver, Plaintiff,

v.

NEW MARSHALL ENGINE COMPANY and FRANK J. MARSHALL,  
Defendants.

Now come the defendants and move that the injunction granted in this action be dissolved and ask for a speedy hearing of this motion either by the Court or by a Special Master appointed for that purpose.

By Defendants' Attorneys, LYMAN W. GRISWOLD.

HAMPDEN, ss:

DEC. 20, 1905.

John W. Mason appointed Special Master.

Hearing app'd Dec. 27, 1905.

By order of the Court.

Attest:

ROBERT O. MORRIS, *Clerk.*

Filed December 20, 1905.

*Appearance.*

FRANKLIN, ss:

Superior Court.

No. 2573.

ANDREW VAN BLARCOM, Receiver,

vs.

NEW MARSHALL ENGINE Co. et al.

DEC. 20TH, A. D. 1905.

Enter our appearance for the defendants in the above action.

BROOKS & HAMILTON, *Attorney.*

Filed December 21, 1905.

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*Replication.*

FRANKLIN, ss:

Superior Court. In Equity.

MARSHALL ENGINE COMPANY, by Receiver,

vs.

NEW MARSHALL ENGINE Co. et al.

And now comes the plaintiff in the above entitled matter and joins issue with the defendants upon their answers.

By FREDERICK L. GREENE, *Attorney.*

Filed June 9, 1906.

*Appearance.*

FRANKLIN, ss:

Superior Court.

No. 2573.

MARSHALL ENGINE Co., by Receiver,

vs.

THE NEW MARSHALL ENGINE Co.

FEB. 2, A. D. 1907.

Enter our appearance for The New Marshall Engine Co. & Frank J. Marshall in the above action.

LAMB & LAWLER, *Attorney*.

Filed February 2, 1907.

40

*Rule to Master.*

COMMONWEALTH OF MASSACHUSETTS,

*Franklin, ss:*

Superior Court. In Equity.

No. 2573.

MARSHALL ENGINE Co., by Receiver,

vs.

NEW MARSHALL ENGINE COMPANY et al.

And now it is ordered that the above entitled cause be referred to John W. Mason, Esq., of Northampton, as Special Master, to hear the parties and their evidence and report his findings to the Court together with such facts and questions of law as either party may request.

By the Court,

[L. s.]

CLIFTON L. FIELD, *Clerk*.

NOTE.—The Master is to report the evidence taken by him under this order of reference without special order of the Court.

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*Report of Special Master.*

FRANKLIN, ss:

Superior Court. In Equity.

MARSHALL ENGINE CO., by Receiver,

v.

NEW MARSHALL ENGINE CO. et al.

Report of John W. Mason, Special Master.

Pursuant to rule of Court I heard the parties and their evidence in the above entitled case on the sixteenth day of June, 1906, on the sixth, thirteenth and twenty-seventh days of October, 1906, and on the sixth, seventh and twenty-second days of December, 1906.

This is a suit in equity to compel the defendants to assign to the plaintiff United States letters patent No. 725,349, to which patent the plaintiff claims an equitable right by reason of the contracts and assignments hereinafter set forth.

In 1886 the defendant, Frank J. Marshall, was granted letters patent No. 342,802 for an improvement in pulp-beating engines. He commenced the manufacture of such engines under this patent in 1887 in his own name, calling the machine "Marshall's Perfecting Engine" or "Marshall's Pulp Beating Engine". In 1897 the defendant, Frank J. Marshall, organized a corporation under the laws of Massachusetts under the name of "Marshall Engine Co." The capital was \$60,000, of which the defendant, Frank J. Marshall, owned all but \$10,000 or \$15,000. This company manu-  
 42 factured pulp beating engines under the aforesaid patent.

On the thirteenth day of September, 1902, the plaintiff corporation was organized under the laws of New Jersey with a capital stock of \$50,000, 50 shares to be preferred stock and 450 shares to be common stock.

On the fifteenth day of September, 1902, the plaintiff corporation and the defendant, F. J. Marshall, made a contract, a copy of which is annexed to the plaintiff's bill of complaint and marked Exhibit A. At the time of this agreement the defendant, F. J. Marshall, had no patents except patent No. 342,802, and had no plant, machinery, furniture, licenses or stock in trade. He had copy books, cash books and ledger, and some debts due to him, and he had pending an application for a patent, on which application patent No. 725,349 was issued in 1903.

At a meeting held on said September fifteenth, 1902, F. J. Marshall was elected a director of the plaintiff corporation, and at a meeting of the Directors held on the seventeenth day of September, 1902, he was elected treasurer of the company. On the fifteenth day of September, 1902, certificates of stock were drawn up and signed by the president and treasurer of the company for four hundred and forty-seven shares of common stock in the name of Frank J.

Marshall, one share in the name of H. H. Picking, one share in the name of F. L. Miner, and one share in the name of Wm. R. Roland. All of these certificates, except the one to Mr. Miner and one for fifty shares to Frank J. Marshall, remain annexed to the original stubs of the stock certificate book, and are without the seal of the corporation.

Prior to September fifteenth, 1902, four engines had been manufactured embodying the improvement described in the patent of 1903, and thereafter between September 15, 1902, and June 13, 1905, either nine or ten engines embodying this improvement were manufactured by the plaintiff.

On the thirteenth day of June, 1905, Andrew Van Blarcom of Newark, New Jersey, was appointed by the Court of Chancery in New Jersey Receiver of the plaintiff corporation, and he was subsequently appointed Ancillary Receiver by the Superior Court in this County as set forth in the third and fourth paragraphs of the plaintiff's bill.

The defendant, F. J. Marshall caused to be organized under the laws of Massachusetts the defendant corporation, the new Marshall Engine Co. The certificate of organization is dated June 21, 1905. The purposes of the organization are "the following: To make, vend, sell, buy and operate all kinds of paper mill and other machinery; to acquire by purchase or otherwise patents covering inventions in machinery of all kinds and at will to sell the same; and to engage in the manufacture, purchasing, vending and selling of paper and paper products of all sorts and descriptions and in particular to acquire by purchase or otherwise patent Number 725,349 of the United States of America for a new and improved device in refining engines known as the Marshall Perfecting Engine, and to engage in the business of making, vending, filling and selling the devices and machines covered by said patent". The capital of this corporation is \$50,000, of which the defendant, F. J. Marshall, owns \$49,700. The defendant, F. J. Marshall, is President and Treasurer of the New Marshall Engine Co. On the twenty-second day of June, 1905, the defendant, F. J. Marshall, executed the assignment to the defendant corporation of patent No. 725,349, a copy of which assignment is annexed to the plaintiff's bill and marked "Exhibit C". This assignment was duly recorded in the United States Patent Office June 30, 1905.

The New Marshall Engine Company has manufactured at least two machines under the patent of 1903; but since this bill was filed and injunction was issued it has manufactured machines like those described in the expired patent of 1886 (No. 342,802) with some modifications, but without the improvement described in the patent of 1903 (No. 725,349). These machines have been advertised in the trade papers by the defendant corporation as "The New Marshall Perfecting Engine", and the catalogues prepared by the plaintiff have been used by the defendant corporation to illustrate its machine.

The contract between the plaintiff corporation and the defendant, F. J. Marshall, hereinbefore referred to (Exhibit

A annexed to the plaintiff's bill) was never recorded in the United States Patent Office. More than three months after its date having passed, on the eighth day of October, 1904, at the request of other parties interested in the plaintiff corporation, the defendant, F. J. Marshall, executed and acknowledged the paper, a copy of which is annexed to the plaintiff's bill and marked "Exhibit B". This paper was duly recorded in the United States Patent Office, October tenth, 1904.

Patent No. 342,802 and patent No. 725,349 are both for improvements in pulp-beating engines. A copy of the specifications and claims in case of patent No. 342,802 is hereto annexed marked "A", and a copy of the specifications and claims in case of patent No. 725,349 is hereto annexed marked "B". The machine described in the second patent is like that described in the first with the single exception that a portion of the machine called in the first patent a "bed plate" is described in the second patent as made in two sections clamped together, instead of being in a single piece. This is the improvement for which the patent of 1903 (No. 725,349) was granted, it being claimed that the improvement facilitated the removal of the plate when necessary for cleaning the machine  
46 or for any other purpose. When the parts are clamped together, so that the machine is ready for use, the operation of the machine is precisely like that of the machine described in the patent of 1886 (No. 342,802).

I find as a matter of fact that the patent No. 725,349, issued in 1903, is for an improvement on the machine described in letters patent No. 342,802 issued to the defendant, Frank J. Marshall, in 1886.

I rule as matter of law that said contracts, or assignments, (Exhibits A and B) are equivalent in equity to assignments of the perfected patent No. 725,349; that the plaintiff is in equity the owner of said patent; and that the defendant, F. J. Marshall, took the legal title to said patent in trust for the plaintiff; that the facts were known to the defendant, F. J. Marshall, at the time of the execution of the assignment to the defendant corporation (Exhibit C), and that, under the circumstances hereinbefore set forth, the knowledge of the defendant, F. J. Marshall, and the recorded assignment (Exhibit B), constituted notice to the defendant corporation of the rights of the plaintiff under said Exhibits A and B.

This construction of the assignments, Exhibits A and B, is in harmony with the construction put upon the same by the parties by their acts as hereinbefore set forth from the time of the said  
47 assignments up to the time of the appointment of the Receiver, June 13, 1905.

I therefore find and rule that the plaintiff is entitled to an assignment of said patent No. 725,349 as prayed for in its bill.

A draft report was submitted to the parties on the sixteenth day of January, 1907, and a hearing thereon was held on the second day of February, 1907.

Respectfully submitted,

JOHN W. MASON,  
*Special Master.*

Copies of the foregoing report were given to counsel for plaintiff and counsel for defendants on the ninth day of February, 1907. On the fourteenth day of February, 1907, the defendants filed with me their objections to this report. Said objections are annexed to this report.

JOHN W. MASON,  
*Special Master.*

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Superior Court. In Equity.

FRANKLIN, ss.:

MARSHALL ENGINE Co., by Receiver,  
vs.  
NEW MARSHALL ENGINE Co. et al.

*Objection Made by the Defendants to the Drafts of the Report of the  
Master in the Above Case.*

## Objection 1.

Second paragraph on page two the defendants object to, for that the report does not state that these engines were manufactured by virtue of a license and for which royalties were charged.

## Objection 2.

On page three of the Master's Report, paragraph ending at the top of page three, the defendants object to, for that; it does not state that F. J. Marshall was not an officer of the New Marshall Engine Co. at the date of making and recording the assignment therein mentioned, but carries the impression that he was such an officer, which is not in accordance with the facts, nor the evidence in the case.

## Objection 3.

The defendants object to the statement in paragraph one on page three, for that; "the catalogues prepared by the plaintiff have been used by the defendant corporation to illustrate its machines", because it is not in accordance with the facts and the evidence in the case.

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## Objection 4.

On page four of the Master's Report, beginning on the second line from the top, the defendants object to that part of the paragraph, beginning with the words, "the machine described, etc." to the end of said paragraph, for that; it is not in accordance with the facts and is contrary to the evidence in the case.

## Objection 5.

The defendants object to the whole of the first paragraph on page four, for that; the statements therein contained are not in accordance with the facts, nor the evidence in the case.

## Objection 6.

The defendants object to the whole of paragraph two on page four, for that; the finding is not in accordance with the law and the facts, and not supported by the evidence in the case.

## Objection 7.

Paragraph three on page four of the Master's Report, the defendants object to the whole of said paragraph, for that; the same is not in accordance with the facts and not supported by the evidence in the case.

## Objection 8.

50 The first paragraph on page five of the Master's Report, the defendants object to the whole of said paragraph, for that; it is not in accordance with the facts and not supported by the evidence in the case.

## Objection 9.

The defendants object to said report, for that; it does not show the objections and exceptions taken by the defendants to the admission and rejection of the evidence in the case of the hearing before him.

## Objection 10.

The defendants object to the finding and ruling in said report, that the plaintiff is entitled to the assignment of the patent prayed for in the bill, for that; said finding and ruling are evidently erroneously based and proceed upon the ground that the improvement mentioned in said patent, applies to and is an improvement upon patent #342,802, whereas, said improvement was not and does not claim to be an improvement upon said patent #342,802 of 1886, but specifically claims therein to be an improvement upon another patent granted to E. R. Marshall in 1889.

## Objection 11.

And the defendants request the master to find and rule in accordance with the claims made in the preceeding objections.

NEW MARSHALL ENGINE CO.,  
FRANK J. MARSHALL,  
By LYMAN W. GRISWOLD,  
LAMB & LAWLER,

*Defendant's Attorneys.*

Filed February 18, 1907.

51 *Motion for Confirmation of Master's Report.*

FRANKLIN, ss:

Superior Court. In Equity.

MARSHALL ENGINE CO., by Receiver,  
v.

FRANK J. MARSHALL AND NEW MARSHALL ENGINE CO.

And now comes the plaintiff in the above entitled matter and moves the Court that the report of the special master to whom said matter was referred be confirmed.

By His Attorney, FREDERICK L. GREENE.

Filed April 6, 1907.

52 *Motion for Attachment for Contempt.*

FRANKLIN, ss:

Superior Court. In Equity.

MARSHALL ENGINE CO., by Receiver,  
v.

NEW MARSHALL ENGINE CO. AND FRANK J. MARSHALL.

And now comes the plaintiff in the above entitled matter and moves the Court that order of notice issue to the defendant Frank J. Marshall to shew cause why he should not be attached for contempt for violation of the injunction heretofore issued in said matter.

By His Attorney, FREDERICK L. GREENE.

Filed April 6, 1907.

53 *Motion to Dismiss.*

FRANKLIN, ss:

APRIL 6, 1907.

Superior Court.

THE MARSHALL ENGINE CO., by Receiver,  
vs.

NEW MARSHALL ENGINE CO. et al.

Motion to Dismiss.

And now comes the defendants in the above entitled action and representing to the court that the plaintiff's bill presents a question

involving an inquiry as to the construction and scope of the patents therein mentioned, of which question, the Federal Courts have exclusive jurisdiction, move that the plaintiff's bill be dismissed on the ground that this court has no jurisdiction.

NEW MARSHALL ENGINE CO. ET AL.,  
By LAMB & LAWLER, *Their Attorneys.*

Filed April 12, 1907.

SUFFOLK, ss:

Boston, Apr. 25, 1907.

Mo. overruled by the Court, after hearing.

Attest:

H. E. BELLEW, *Ass't Clerk.*

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*Notice of Appeal.*

FRANKLIN, ss:

APRIL 26TH, 1907.

Superior Court.

MARSHALL ENGINE CO., by Receiver,  
vs.  
NEW MARSHALL ENGINE CO. et al.

*Notice of Appeal.*

And now come the defendants in the above entitled action and representing that they feel and are ag-grieved by the decision of the court, dismissing their motion on file in the case for the dismissal of said action, for want of jurisdiction, respectfully appeal from said decision.

NEW MARSHALL ENGINE CO.,  
FRANK J. MARSHALL,  
By LAMB & LAWLER,

*Their Attorneys.*

Filed April 27, 1907.

55 *Interlocutory Decree In re Attachment for Contempt.*

FRANKLIN, ss:

Superior Court. In Equity.

No. 2573.

MARSHALL ENGINE COMPANY, by Receiver,  
vs.  
NEW MARSHALL ENGINE COMPANY et al.

*Interlocutory Decree.*

Upon motion filed in this court on April 6th, last, for order of notice to the defendant Frank J. Marshall to show cause why he

should not be attached for contempt for violation of the injunction heretofore issued in this case. After hearing evidence and arguments of counsel for all parties with reference thereto;

It is hereby ordered, adjudged and decreed that the defendant, Frank J. Marshall is in contempt of this court for violation of the injunction heretofore issued in this case;

And it is further adjudged, ordered and decreed that said defendant, Frank J. Marshall pay to the receiver of the plaintiff the sum of four hundred and forty five dollars (\$445.00) for and on account of such contempt;

And it is further adjudged, ordered and decreed that the enforcement of this order be suspended until further order of this court.

56 By the court,

CLIFTON L. FIELD, *Clerk*.

May 4th, 1907.

Entered May 4, 1907.

*Motion for Final Decree and Final Decree.*

FRANKLIN, ss:

Superior Court. In Equity.

MARSHALL ENGINE Co., by Receiver,

vs.

NEW MARSHALL ENGINE Co. et al.

And now comes the petitioner and shews the Court that the matters stated in his bill have heretofore been referred to a Master, that the *the* Master has filed his report in this Court, and that said report has been confirmed by this Court:

The petitioner therefore moves the court to enter a decree in accordance with the prayer of his bill and the said Master's report.

By His Solicitor, FREDERICK L. GREENE.

This matter came on to be heard upon the foregoing motion this sixteenth day of September, A. D. 1907, and now after consideration of said motion, the pleadings and Master's report in said cause, the order confirming the same, and arguments of counsel,

57 It is adjudged, ordered and decreed that the New Marshall Engine Company—Frank J. Marshall, defendants, their agents, attorneys and servants, be perpetually enjoined and restrained from assigning or disposing of any right, title or interest in or to Letters Patent of the United States, No. 725,349, save in accordance with this decree;

That the New Marshall Engine Company defendant, be required to execute to the Marshall Engine Company, plaintiff, an assignment in due form, so as to entitle the same to be recorded in the Patent Office of the United States at Washington, of all its interest in Let-

ters Patent of the United States No. 725,349, and of all its rights thereunder; and to deliver the same to the plaintiff, the Receiver;

That the plaintiff recover from the defendants costs as in a suit at law to be taxed by the clerk.

Jan'y 11, '08.

By the Court.

CLIFTON L. FIELD, *Clerk.*

Entered January 25, 1908.

58 *Motion for Final Decree and Final Decree.*

FRANKLIN, ss:

Superior Court. In Equity.

MARSHALL ENGINE Co., by Receiver,

vs.

NEW MARSHALL ENGINE Co. et al.

And now comes the petitioner and shows the court that the matters stated in his bill have heretofore been referred to a Master, that the Master has filed his report in this Court, and that said report has been confirmed by this Court.

The petitioner therefore moves the Court to enter a decree in accordance with the prayer of his bill and the said Master's report.

By His Solicitor, FREDERICK L. GREENE.

### *Final Decree.*

This matter came on to be heard upon the foregoing motion the sixteenth day of September, A. D. 1907, and now after consideration of said motion, after sundry mesne continuances, the pleadings and Master's report in said cause, the order confirming the same, and arguments of counsel;

59 It is adjudged, ordered and decreed that the New Marshall Engine Company and Frank J. Marshall defendants, their agents, attorneys and servants, be perpetually enjoined and restrained from assigning or disposing of any right, title or interest in or to Letters Patent of the United States No. 725,349, save in accordance with this decree;

That the New Marshall Engine Company, defendant, be required to execute to the Marshall Engine Company, plaintiff, an assignment in due form, so as to entitle the same to be recorded in the Patent Office of the United States at Washington of all its interest in Letters Patent of the United States No. 725,349, and of all its rights thereunder, and to deliver the same to the plaintiff, the Receiver; and that in case of the refusal or neglect of said New Marshall Engine Company for thirty days after notice to it of the entry of this decree to execute and deliver such assignment, that Henry J. Field Esqr. of Greenfield, in the County of Franklin be appointed agent to exe-

cute in the name of and for and in behalf of said New Marshall Engine Company such assignment and to deliver the same to the plaintiff, the Receiver;

That the New Marshall Engine Company and Frank J. Marshall, defendants, their agents, attorneys and servants, and all persons acting or claiming under them or any of them be perpetually enjoined and restrained from engaging in the business of making, vending, filling, selling and otherwise dealing in and with, the devices and machines covered by Patent No. 725,349 of the United States  
60 of America, for a new and improved device in refining engines known as the "Marshall Perfecting Engine;"

That the defendants the New Marshall Engine Company and Frank J. Marshall forthwith pay to the plaintiff the sum of one hundred four dollars and ninety seven cents as and for costs of this suit, and that execution issue therefor.

March 21st, 1908.

By the Court.

CLIFTON L. FIELD, *Clerk.*

Filed March 21, 1908.

*Disappearance.*

FRANKLIN, ss:

Superior Court.

No. 2573.

MARSHALL ENGINE CO., by Receiver,

vs.

NEW MARSHALL ENGINE CO. et al.

APRIL 11, A. D. 1908.

Enter our disappearance for the defendants in the above action.

LAMB & LAWLER, *Attorneys.*

Filed April 11, 1908.

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*Appearance.*

FRANKLIN, ss:

Superior Court.

No. 2573.

MARSHALL ENGINE CO., by Receiver,

vs.

NEW MARSHALL ENGINE CO. et al.

APRIL 11, A. D. 1908.

Enter my appearance for the defendants in the above action.

FRANK J. LAWLER, *Attorney.*

Filed April 11, 1908.

*Notice of Appeal and Appeal.*

FRANKLIN, ss:

Superior Court.

MARSHALL ENGINE Co., by Receiver,

vs.

NEW MARSHALL — Co. et al.

Notice of Appeal and Appeal.

APRIL 11TH, 1908.

And now comes the defendant in the above entitled case and having received notice of the entry of the decree in said case, gives notice of an appeal and appeals from said decree to the Supreme Judicial Court.

NEW MARSHALL ENGINE COMPANY  
ET AL.,

By Their Attorneys, LYMAN W. GRISWOLD,  
FRANK J. LAWLER.

Filed April 11, 1908.

62 And upon the twentieth day of October A. D. 1908, a rescript was received and placed on file in the office of the clerk of this court, the same being in the words following, to wit:

COMMONWEALTH OF MASSACHUSETTS:

Supreme Judicial Court for the Commonwealth, at Boston, Oct. 19,  
1908.

In the case of

THE MARSHALL ENGINE COMPANY

vs.

THE NEW MARSHALL ENGINE COMPANY et al.

pending in the Superior Court for the County of Franklin

Ordered, that the clerk of said court in said county make the following entry under said case in the docket of said court; viz.,—

Decree affirmed with costs.

By the Court,

C. H. COOPER, *Clerk.*

October 19, 1908.

*Brief Statement of the Grounds and Reasons of the Decision.*

Opinion Herewith.

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*Final Decree.*

FRANKLIN, ss:

Superior Court. In Equity.

MARSHALL ENGINE Co., by Receiver,  
vs.  
NEW MARSHALL ENGINE Co. et al.

Final Decree.

This matter came on to be heard on this sixteenth day of January A. D. 1909 on motion of the plaintiff for entry of a final decree therein and now after consideration of said motion and arguments of counsel thereon;

It appearing from the files and records of this court that there was received by the clerk of this Court from the clerk of the Supreme Judicial Court for the Commonwealth a rescript on October 20th 1908 in words following viz. "Decree affirmed with Costs;"

It is adjudged, ordered and decreed in accordance with said rescript that the decree entered in this Court, March 21st, 1908 be affirmed; and it is further adjudged, ordered and decreed that the defendants the New Marshall Engine Company and Frank J. Marshall \$29.79 pay to the plaintiff the sum of twenty nine dollars, seventy-nine cents as and for costs of this suit since the entry of said decree, and that execution issue therefor;

64 And it is further ordered, adjudged and decreed that the order of this Court entered May 4th 1907 suspending the enforcement of the order of this Court entered May 4th 1907 adjudging the defendant Frank J. Marshall in contempt be revoked, and that said order adjudging the said defendant in contempt and ordering him to pay the Receiver of the plaintiff the sum of four hundred and forty-five dollars (\$445.) be affirmed.

January 16th, 1909.

By the Court, CLIFTON L. FIELD, *Clerk.*

Entered January 16, 1909.

65

*Decree.*

FRANKLIN, ss:

Superior Court. In Equity.

#2573.

MARSHALL ENGINE Co., by Receiver,

vs.

NEW MARSHALL ENGINE Co. et al.

*Decree.*

This case came on to be heard this 10th day of April, A. D. 1909 upon oral motion of counsel for the plaintiff that execution for its costs issue forthwith in accordance with the decrees heretofore entered in said case, March 21st A. D. 1908, and January 16th A. D. 1909; and that process of attachment for contempt against the defendant Frank J. Marshall issue for failure to pay to the Receiver of the plaintiff the sum of four hundred and forty-five dollars (\$445.); as ordered by decree entered 4th May, A. D. 1907 as confirmed by decree entered 16th January 1909;

And thereupon after hearing counsel for the plaintiff and counsel for the defendants, and it appearing by statements and agreement of counsel that execution for costs had not issued, that no part of the same had been paid, and that the defendant Marshall had not paid to the Receiver of the plaintiff the sum of four hundred and  
66 forty-five dollars (\$445.) or any part thereof, and after consideration of the premises;

It is adjudged, ordered and decreed that execution issue forthwith against said defendant in accordance with said motion for the sum of one hundred thirty-four dollars and seventy-six cents (\$134.76), being the sum of the amounts ordered to be paid by the decrees aforementioned; March 21st A. D. 1908, and January 16th A. D. 1909;

And it is further adjudged, ordered and decreed that a writ of attachment for contempt also issue forthwith against the said Frank J. Marshall for his failure to pay the Receiver of the plaintiff the sum of four hundred and forty-five dollars (\$445.), as ordered in the decrees entered 4th May, 1907 and 16th January, 1909.

And it is ordered that the said defendant Frank J. Marshall pay to the said plaintiff forthwith the sum of — as and for his costs of this application and of such attachment.

April 24, 1909.

By the Court, CLIFTON L. FIELD, *Clerk.*

Entered April 29, 1909.

MARSHALL ENGINE CO., by Receiver,  
vs.  
NEW MARSHALL ENGINE CO. et al. (FRANK J. MARSHALL).

(In Equity.)

Bond & Babson.  
Greene & Davenport.  
Lyman W. Griswold.  
Brooks & Hamilton.  
[Lamb & Lawler.]\*  
Frank J. Lawler.

Bill filed Oct. 23/'05 & same day restraining order & or. of no. returnable Oct. 28/'05 at 9 A. M., issued per order Fessenden, J.

Resp'd'ts' app. filed Oct. 28/'05.

Pl'ff's mo. that Bill be taken pro confesso filed Dec. 5, 1905.

Def'ts' ans. filed by consent of Court Dec. 11, 1905 Fessenden, J.

Def'ts' mo. for dissolution of injunction or speedy hearing by Court or Special Master filed Dec. 20/'05 & same day Court sitting in Hampden Co. appoints John W. Mason Special Master, and a hearing for Dec. 27/'05.

App. of Brooks & Hamilton for def'ts filed Dec. 21/'05.

Request for issuing a commission for taking dep'n & interrogatories filed Feb. 20/'06.

Application for com. to take dep'n & interrogatories filed Feb'y 23/'06.

Application for com. to take dep'n & interrogatories filed Feb'y 24/'06.

Application com's to take dep'ns & interrogatories filed April 5/'06.  
(Rule issued.)

Pl'ff's replication filed June 9/'06.

Dep'ns G. Cameron, L. D. Post, J. P. Franklin, G. H. Blish, J. B.

Craig, & F. L. Miner, filed Oct. 6, 1906.

68 Lamb & Lawler app. for resp'd'ts Feb'y 2/'07.

Report of Special Master filed Feb'y 18/'07.

Mo. for confirmation of Master's report & mo. for attachment for contempt filed Apr. 6/'07 & same day, Fessenden, J. orders Master's report confirmed and or. of no. returnable Apr. 13, '07, to show cause, etc.

Resp'd'ts' mo. to dismiss filed April 12/'07.

Apr. 13/'07 C. to Apr. 20/'07.

Court, Fessenden, J. orders papers transferred to 1st Equity Div'n, Mo. Session for hearing at 2 o'clock p. m. Apr. 25/'07 on Apr. 20, 1907 & same day case cont'd to May 4, prox. 9.15 A. M.

Court after hearing, at Suffolk, overrules mo. to dismiss Apr. 25/'07.

[\* Words enclosed in brackets erased in copy.]

Resp'd'ts' no. of appeal filed April 27/'07.

Court, Fessenden, J. finds def't Marshall in contempt & orders that he pay Receiver the sum of \$445.00 and suspends the enforcement of this order till further order of the Court, May 4/'07. (See decree on file.)

Fessenden, J. orders entry of final decree Sept. 16/'07.

(Final decree entered Jan. 11/'08, Fessenden, J.

Feb'y 8/'08 time for filing of final decree advanced two weeks, Fessenden, J. (Jan. 25.)

Feb'y 15/'08, time further advanced 5 weeks, Fessenden, J. (M'ch 21.))

69 All parties agreeing & by order of Court, Fessenden, J. all docket entries relative to final decree from & after Jan. 11/'08 stricken out M'ch 21/'08, & same day final decree entered, Fessenden, J.

Disappearance of Lamb & Lawler for def'ts filed Apr. 11/'08 & same day F. J. Lawler app. for def'ts.

Def'ts' no. of appeal & appeal filed Apr. 11/'08.

S. J. C. rescript rec'd & filed Oct. 20/'08—"Decree affirmed with costs."

Court, Fessenden, J. orders entry of final decree Jan'y 16, 1909.

Fessenden, J. orders ex-on and writ of attachment to issue Apr. 24/'09, & decree on above orders entered Apr. 29/'09 & same day ex'on & writ of attachment issued.

On May 29/'09 Fessenden, J. orders hearing in re writ of attachment etc.

C. to June 12/'09 at 9 A. M. & F. J. Marshall recog. in \$2000. to appear June 12/'09.

Def'ts' appl'n for writ of error, assignment of errors and bond to pay dam. & costs filed July 7/'09.

## 70 COMMONWEALTH OF MASSACHUSETTS,

*Franklin, ss:*

### Superior Court.

I, John A. Aiken, Chief Justice of the Superior Court, in and for said Commonwealth, do certify that Clifton L. Field, by whom the foregoing certificate and attestation was made, and who has thereunto subscribed his name, was, at the time of making thereof, and still is, Clerk and proper certifying officer of said Court for said County of Franklin, duly Commissioned and sworn; and has, by law, the custody of the seal, and all the records, books, documents and papers of or appertaining to said Court, and that said certificate and attestation are in due form to authenticate the records of said Court, and entitled to full faith and credit, as well in Courts of Judicature as elsewhere.

In testimony whereof, I have hereunto set my hand this seventeenth day of July in the year of our Lord one thousand nine hundred and nine.

JOHN A. AIKEN,  
*Justice of the Superior Court.*

I, Clifton L. Field, Clerk of the Superior Court in and for said County of Franklin, do certify that the Honorable John A. Aiken, by whom the foregoing attestation was made, and who has thereunto subscribed his name, was, at the time of making thereof, and still is, Chief Justice of the Superior Court of said Commonwealth, duly Commissioned and Sworn; to all whose acts, as such Justice, full faith and credit are and ought to be given, as well in Courts of Judicature as elsewhere.

In testimony whereof, I have hereunto set my hand and affixed the seal of said Superior Court, this seventeenth day of July in the year of our Lord one thousand nine hundred and nine.

[Seal the Superior Court.]

CLIFTON L. FIELD,  
*Clerk of said Court.*

71 All and singular which premises we have held good by the tenor of these presents to be exemplified.

In testimony whereof, we have caused the seal of our said Court to be hereunto affixed.

Witness, John A. Aiken, Esquire, Chief Justice of our said Superior Court at Greenfield, in said County of Franklin, this sixteenth day of July, in the year of our Lord one thousand nine hundred and nine.

[Seal the Superior Court.]

CLIFTON L. FIELD, *Clerk.*

72 COMMONWEALTH OF MASSACHUSETTS:

BOSTON, November 3, 1908.

I certify the annexed to be a true copy of the opinion of the Supreme Judicial Court in the case of Marshall Engine Company vs. New Marshall Engine Company et al. decided on the 19th day of October, 1908.

HENRY WALTON SWIFT,  
*Reporter of Decisions.*

72½ LORING, J.:

The only ground on which the defendants contend that the decree in favor of the plaintiff should be reversed is that the case at bar is a case arising under the patent-right laws of the United States. If it is, this court has no jurisdiction. By U. S. Rev. Sts. s. 711, clause fifth, the jurisdiction given to the courts of the United States in such cases is exclusive of the courts of the several States.

The cause was sent to a master. From his report it appears that in 1886 a patent was issued to the defendant Marshall for an improvement in pulp-beating machines.

This patent expired on June 1, 1903. Between eight and nine months before the expiration of this patent, (on September 13, 1902,) Marshall organized the plaintiff corporation in New Jersey. It had a capital stock of \$50,000, \$5000 of which were preferred and \$45,000 common. On September 15,

1902, all the common stock was issued to Marshall in consideration of an assignment by him of the "United States Letters Patent, No. 342,802 for improvement in Engines issued to Frank J. Marshall June 1, 1886, and all improvements thereon and renewals of the same," and the good-will of his business. This was not recorded in the patent office. At the date of this agreement Marshall "had pending an application for a patent on which application patent 725,349 was issued in 1903."

The assignment of September 15 contained a covenant of further assurance, and on October 8, 1904, (one year and four months after the original patent had expired,) Marshall, at the request of the plaintiff, executed and delivered to it an assignment in pursuance of this covenant of further assurance. After reciting that he had obtained "Letters Patent of the United States of America for an improvement in engines, which Letters patent, are numbered 342,802," and that he had made a former assignment of the patent, and the fact that the assignment was not recorded and that he previously had made a covenant of further assurance, Marshall assigned to the plaintiff "the whole right, title and interest in and to the said improvement in engines, and in and to the Letters Patent therefor aforesaid, and all further improvements thereon and renewals of the aforesaid patent."

74 Meanwhile, to wit, on April 14, 1903, Marshall had obtained another patent for an improvement in pulp-beating engines. With respect to this improvement the master made this finding: "The machine described in the second patent is like that described in the first with the single exception that a portion of the machine called in the first patent a 'bed plate' is described in the second patent as made in two sections clamped together, instead of being in a single piece. This is the improvement for which the patent of 1903 (No. 725,349) was granted, it being claimed that the improvement facilitated the removal of the plate when necessary for cleaning the machine or for any other purpose. When the parts are clamped together, so that the machine is ready for use, the operation of the machine is precisely like that of the machine described in the patent of 1886 (No. 342,802)."

On June 15, 1905, a receiver was appointed for the plaintiff corporation in New Jersey, and later the same person was appointed receiver in ancillary proceedings begun in Massachusetts. On June 21, 1905, Marshall organized a Massachusetts corporation to operate the patent rights covered by the later patent, (No. 725,349,) and on June 22 assigned that patent to the new corporation. This new corporation is the other defendant in the suit now before us. The Massachusetts corporation has a capital stock of \$50,000, all issued to Marshall except three shares, and Marshall is the president and treasurer of it.

75 In taking out the letters-patent No. 725,349, for the improvement in pulp-beating machines, Marshall stated that this was "an improvement on patent No. 411,251, granted September 17, 1889, to E. R. Marshall and also embodies features shown in patent No. 342,802, granted June 1, 1886 to myself." Beyond this state-

ment in letters-patent 725,349, it does not appear that a patent was issued to E. R. Marshall. It nowhere appears in the case what the improvement covered by that patent consists of nor who E. R. Marshall is.

The words "all improvements thereon" in the agreement of September 15, 1902, include all improvements on the improvement in engines for which the original letters-patent were granted. On the finding of the master the improvement for which letters-patent No. 725,349 were issued was an improvement in engines for which the original letters-patent (No. 342,802) were granted and is covered by the agreement of September 10. This conclusion is enforced by the fact that when this agreement was made Marshall had pending an application for the improvement afterwards covered by letters-patent 725,349.

The defendants contend that the question whether the improvement for which the later letters-patent were issued is an improvement on the former improvement is a question arising under the patent-right laws of the United States.

It is settled that "where a suit is brought on a contract of  
76 which a patent is the subject matter, either to enforce such contract or to annul it, the case arises on the contract or out of the contract and not under the patent-right laws of the United States." *Wade v. Lawder*, 165 U. S. 624, and cases cited. See also *Lamson v. Martin*, 159 Mass. 557.

Further, it is settled that if the invalidity of a patent is incidentally drawn in question in a cause properly cognizable in a State court, the jurisdiction of that court is not thereby ousted. *Pratt v. Paris Gas Light & Coke Co.* 168 U. S. 255. See also in this connection *Jackson v. Allen*, 120 Mass. 64; *Burton v. Burton Stock Exchange Co.* 171 Mass. 437.

The principal argument of the defendants in support of their contention is founded on the clause of the final decree by which the defendants and both of them, together with "all persons acting or claiming under them or any of them" are "perpetually enjoined and restrained from engaging in the business of making, vending, filling, selling and otherwise dealing in and with, the devices and machines covered by Patent No. 725,349 of the United States of America, for a new and improved device in refining engines known as the 'Marshall Perfecting Engine.'"

This argument, put forward by the defendants in several forms, is that a suit for an infringement would have resulted in such an injunction as that contained in the final decree of the case at bar, and for that reason the suit now before us is a suit arising under the patent-right laws of the United States.

77 In the case at bar the right of the plaintiff to an assignment of patent No. 725,349 was and is a right arising out of the contract between the plaintiff and Marshall, dated September 15, 1902. By force of that contract, under the facts which afterwards happened, the plaintiff was entitled to a decree directing both defendants to assign that patent to the plaintiff. As a corollary and as an incident to that relief it was perhaps not improper to enjoin these

defendants from doing acts which the owner of that patent alone can do. However, that may be the decree in the suit now before us is not a decree that the defendants have done certain acts which it is now decided are a violation of the rights secured to the plaintiff by letters-patent. It is a decree that since the plaintiff is the owner of the patent here in question the defendant cannot do those acts which the patent secures to the owner, without deciding what those acts are. In other words, the suit now before us is just what *Excelsior Wooden Pipe Line Co v. Pacific Bridge Co.*, 185 U. S. 282 (relied on by the defendants) was not.

The defendants have also argued that to decide in favor of the plaintiff this court must determine a question of infringement between the patent 342,802 and patent 411,251.

The short answer to that contention is that no such case appears to have been raised in evidence before the master. It does not appear even what patent 411,251, consists in. In that state of the evidence there can be no question of infringement between 342,802 and 411,251. We do not intend to intimate that this objection would have been good if it had appeared that one of these two patents infringed upon the other.

Decree affirmed.

78½ [Endorsed:] Marshall Engine Co. vs. New Marshall Engine Co. Certified copy of the opinion of the Supreme Judicial Court.

79 COMMONWEALTH OF MASSACHUSETTS,  
*Franklin, ss:*

Superior Court. In Equity.

THE MARSHALL ENGINE COMPANY, by ANDREW VAN BLARCOM, Its Receiver,

vs.

THE NEW MARSHALL ENGINE COMPANY and FRANK J. MARSHALL.

*Defendants' Application for a Writ of Error.*

The above named defendants, The New Marshall Engine Company and Frank J. Marshall, conceiving themselves aggrieved by the final decree, entered on January 16, 1909, in the above entitled proceeding for the reasons and in the particulars set forth in its Assignments of Error filed herewith, pray that the writ of error from the Supreme Court of the United States submitted herewith may be allowed and issued to the end that said errors may be corrected and said decree reversed.

THE NEW MARSHALL ENGINE COM-  
PANY AND  
FRANK J. MARSHALL,  
By EDMUND A. WHITMAN,  
FRANK J. LAWLER, *Their Attorneys.*

Filed July 7, 1909.

## Supreme Court of the United States.

THE NEW MARSHALL ENGINE COMPANY and FRANK J. MARSHALL  
(Original Defendants), Plaintiffs in Error,  
against

THE MARSHALL ENGINE COMPANY, by ANDREW VAN BLARCOM, Its  
Receiver (Original Plaintiff), Defendant in Error.

*Assignment of Errors.*

On a final decree of the Superior Court of Massachusetts, holden at Greenfield, within and for the county of Franklin, said decree being entered January 16, A. D. 1909, wherein the said The Marshall Engine Company, a corporation duly organized under the laws of New Jersey, by Andrew Van Blarcom, its Receiver, is the plaintiff, and the said, The New Marshall Engine Company, a corporation duly organized under the laws of Massachusetts, and Frank J. Marshall, both of Montague, Massachusetts, are the defendants:

The said The New Marshall Engine Company and Frank J. Marshall assign as errors in the record of the process and decree aforesaid the following, to-wit:

1. That by the record aforesaid, it appears that the final  
81 decree and judgment was given by said Superior Court of the Commonwealth of Massachusetts, sitting in equity, against the said The New Marshall Engine Company and Frank J. Marshall, plaintiffs in error, and in favor of The Marshall Engine Company, defendant in error; whereas by the law of the land and by the Constitution of the United States said decree and judgment ought to have been given for the said The New Marshall Engine Company and Frank J. Marshall against The Marshall Engine Company.

2. That the Supreme Judicial Court of the Commonwealth of Massachusetts erred under said Constitution of the United States and the law of the land in holding and deciding that the decree of the Superior Court sitting in equity in original jurisdiction should be affirmed.

3. That said Superior Court erred in entering said decree because it appears from the record in the case that said court was without jurisdiction, as said cause was cognizable only in the courts of the United States.

4. That said court erred in holding that the matter in controversy between the parties to said cause did not involve any question of infringement of the patents set forth in the bill filed by the plaintiff in said cause, now the defendant in error, and so was not a matter exclusively cognizable in the Courts of the United States under the patent right laws of the United States.

82 5. That said court erred in holding and deciding that it, sitting in equity in original jurisdiction, had either jurisdiction or power to either grant or issue in any respect either the injunction sued for against the plaintiff in error or either of the injunctions

or restraining judgment issued in this suit, whereas it should have held and decided that any such jurisdiction or power was denied by the Constitution of the United States and the laws made in pursuance thereof.

6. That the cause of action set forth in said record in this case is a suit arising under the patent right laws of the United States, and as such was not cognizable in said court, and said court had no jurisdiction to hear and determine any question of infringement of a patent right.

7. That the question presented by the record in said case is as to the construction to be given to the law governing the assignment given in pursuance of Section 4898 of the Revised Laws of the United States, under which the plaintiff, now the defendant in error, claims title, and the question raised therefore was one exclusively for the courts of the United States.

8. That said court erred in holding and deciding that the invention shown in letters patent of the United States with a Serial Number 725,349 was an improvement upon the invention shown in 83 letters patent of the United States with a Serial Number 342,802, whereas it should have held and decided that said first named invention was an improvement upon the invention shown and described in letters patent of the United States with a Serial Number 411,251.

9. That said court erred in holding and deciding that the assignment from the said Frank J. Marshall, plaintiff in error, to the said The Marshall Engine Company, defendant in error, dated October 8, 1904, had any binding effect upon said Frank J. Marshall to compel him to assign to said defendant in error said letters patent numbered 725,349, inasmuch as the letters patent referred to in said assignment had expired prior to the date of said assignment, said question being one exclusively for the cognizance of the Courts of the United States.

10. That the said court in entering the decree above referred to was compelled to determine that the improvement for which letters patent Number 725,349 were issued was an improvement on the invention shown in letters patent numbered 342,802, which matter was not cognizable by said court but was a matter exclusively cognizable by the courts of the United States.

11. That said Superior Court was without jurisdiction to enter said decree or judgment against the plaintiff in error because the matters involved in said proceeding were cognizable only in 84 the courts of the United States for the several reasons herein above set forth and therefore said suit or proceeding by said defendant in error, and the said decree rendered therein, was repugnant to the Constitution of the United States and the laws made in accordance therewith relating to patent rights.

THE NEW MARSHALL ENGINE COMPANY AND

FRANK J. MARSHALL,

By EDMUND A. WHITMAN,

FRANK J. LAWLER, *Their Attorneys.*

Filed July 7, 1909.

*Citation on Writ of Error.*

UNITED STATES OF AMERICA, ss:

The President of the United States to The Marshall Engine Company, by Andrew Van Blarcom, its Receiver, Greeting:

You are hereby cited and admonished to be and appear in the Supreme Court of the United States in the city of Washington, on the\* twenty-fourth day of July next, pursuant to a Writ of Error filed in the Clerk's Office of the† Superior Court of the Commonwealth of Massachusetts, holden at Greenfield within and for the County of Franklin wherein The New Marshall Engine Company and Frank J. Marshall are plaintiffs in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiffs in error as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable John A. Aiken Chief Justice of the Superior Court of the Commonwealth of Massachusetts this twenty-fourth day of June, in the year of our Lord one thousand nine hundred and nine.

JOHN A. AIKEN,  
*Chief Justice Superior Court.*

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\* Not exceeding 30 days from the day of signing.

† Name of Court to which Writ of Error is directed.

Service of the within citation is hereby accepted.

UNITED STATES OF AMERICA,  
*District of Massachusetts, ss:*

BOSTON, July 3rd, 1909.

I hereby certify that on the third day of July, 1909. I served the within citation by giving in hand at Boston to Frederick L. Greene, Attorney for the within named Andrew Van Blarcom Receiver a true and attested copy of this Precept.

JAMES C. RUHL,  
*Deputy United States Marshal.*

*Fees.*

Service .....	2.00
Travel .....	.06
Copy .....	.30
	<hr/>
	\$2.36

[Endorsed:] Marshal's No. 7202. U. S. Marshal's Office, P. O. Building, Boston, Mass. Jul- 3, 1909.

86 COMMONWEALTH OF MASSACHUSETTS,  
*Franklin, ss:*

Superior Court.

I, Clifton L. Field, Clerk of the Superior Court within and for the County of Suffolk and Commonwealth of Massachusetts, hereby certify that the papers hereunto annexed are an exemplification of the Record in the case of Marshall Engine Company, by Receiver, Complainant, vs. New Marshall Engine Company and Frank J. Marshall, Respondents, in said Superior Court determined, and attached thereto and transmitted with said Record are attested copies of the opinion of the full court and the application for writ of error, and the original citation with the return of the officer endorsed thereon.

In witness Whereof, I have hereunto set my hand and affixed the seal of said Court, at Greenfield, this sixteenth day of July, in the year of our Lord one thousand nine hundred and nine.

[Seal of the Superior Court.]

CLIFTON L. FIELD, *Clerk.*

87 (*Bond on Writ of Error.*)

Know all men by these presents, That we, The New Marshall Engine Company, a corporation organized under the laws of the Commonwealth of Massachusetts and doing business in Montague in the County of Franklin, Commonwealth of Massachusetts and Frank J. Marshall of said Montague, as principals, and — — are held and firmly bound unto The Marshall Engine Company, a corporation organized under the laws of the State of New Jersey, by Andrew Van Blarcom, its Receiver, in the full and just sum of Five hundred (500) Dollars to be paid to the said The New Marshall Engine Company through Andrew Van Blarcom, its Receiver its certain Attorney, Executors, Administrators, or Assigns; to which payment well and truly to be made we bind ourselves, our Heirs, Executors, and Administrators, jointly and severally, by these Presents.

Sealed with our seals, and dated the — day of — in the year of our Lord one thousand nine hundred and nine.

Whereas lately at a sitting of the Superior Court of the Commonwealth of Massachusetts at Greenfield within and for the County of Franklin in a suit depending in said Court between The Marshall

88 Engine Company, by Andrew Van Blarcom, its Receiver, Plaintiff and said The New Marshall Engine Company and

Frank J. Marshall, Defendants, decree was rendered against the said New Marshall Engine Company and Frank J. Marshall and the said The New Marshall Engine Company and Frank J. Marshall having procured a writ of error and filed a copy thereof in the clerk's office of the said Court to reverse the judgment in the aforesaid suit, and a citation directed to the said The Marshall Engine Company by Andrew Van Blarcom, its Receiver citing and admonishing it to be and appear at a Supreme Court of the United

States to be holden at Washington on the second Monday of October next:

Now the condition of the above obligation is such, that if the said The New Marshall Engine Company and Frank J. Marshall shall prosecute their said writ of error to effect, and answer all damages and costs, if they fail to make their plea good, then the above obligation to be null and void; otherwise to remain in full force and virtue.

Signed, sealed and delivered in presence of

89	NEW MARSHALL ENGINE CO.	[SEAL.]
	F. J. MARSHALL, <i>Treas.</i>	
	FRANK J. MARSHALL.	[SEAL.]
	EDWARD D. GOLAND.	[SEAL.]
	ALEXANDER GIBSON.	[SEAL.]
	JAMES A. MULLEN.	[SEAL.]

Approved:

JOHN A. AIKEN,  
*Chief Justice of the Superior Court.*

90 COMMONWEALTH OF MASSACHUSETTS,  
*Franklin, ss:*

I, Edward D. Goland, of Greenfield, in the County of Franklin and Commonwealth of Massachusetts, on oath, depose and say, that I have Real Estate in said Greenfield valued at Twenty Eight Hundred (\$2800) Dollars, that the same is subject to a mortgage of Eight Hundred Dollars (\$800.00) which is all the incumbrance upon said property.

Witness my hand this twenty second day of June, A. D. One Thousand Nine Hundred and Nine.

EDWARD D. GOLAND.

Subscribed and Sworn to, before me this twenty second day of June, A. D. One Thousand Nine Hundred and Nine.

HENRY D. BARDWELL,  
*Justice of the Peace.*

91 COMMONWEALTH OF MASSACHUSETTS,  
*Franklin, ss:*

I Alexander Gibson of Turners Falls, in county of Franklin and Commonwealth of Massachusetts, on oath dispose and say, that I have Real Estate in said Turners Falls worth \$3600.00 (Thirty six hundred dollars) on which there is a mortgage of Three Hundred Dollars (\$300.00) and that the same stands in my name, and there is no other incumbrances upon it.

Witness my hand this twenty second day of June, A. D. One Thousand Nine Hundred and Nine.

ALEXANDER GIBSON.

Subscribed and Sworn to, before me, this twenty second day of June One Thousand Nine Hundred and Nine.

HENRY D. BARDWELL,  
*Justice of the Peace.*

Filed July 7, 1909.

92      A true copy of the bond.

In Witness Whereof I hereto set my hand and affix the seal of said Court, at Greenfield, this seventeenth day of July, in the year of our Lord one thousand nine hundred and nine.

[Seal of the Superior Court.]

CLIFTON L. FIELD, *Clerk.*

Endorsed on cover: File No. 21,774. Massachusetts, Superior Court. Term No. 107. The New Marshall Engine Company and Frank J. Marshall, plaintiff in error, vs. The Marshall Engine Company, by Andrew Van Blarcom, its Receiver. Filed July 27th, 1909. File No. 21,774.



19

Office Supreme Court, U. S.  
**FILED.**

DEC 15 1911

JAMES H. McKENNEY,  
CLERK.

# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1911.

**No. 107.**

THE NEW MARSHALL ENGINE COMPANY AND FRANK  
J. MARSHALL, PLAINTIFF IN ERROR

*vs.*

THE MARSHALL ENGINE COMPANY, BY ANDREW  
VAN BLARCOM, ITS RECEIVER

IN ERROR TO THE SUPERIOR COURT OF MASSACHUSETTS

## **PLAINTIFF'S BRIEF**

### **STATEMENT OF THE CASE**

This is a bill in equity brought by the Marshall Engine Co., of New Jersey, by its receiver, against the New Marshall Engine Co., a Massachusetts corporation, and Frank J. Marshall, of Montague, in the County of Franklin, Massachusetts.

The respondents filed a motion to dismiss for want of jurisdiction. The motion was overruled and an appeal taken to this court.

Bill is dated October 21, 1905, and the 8th, 9th, 10th and 11th allegations contained therein are as follows:

#### *Eighth Allegation:*

"And the plaintiff further shows upon information and belief that heretofore and before the first day of June, 1886, the said Frank J. Marshall had invented a certain new and useful improvement in refining engines, which had not previously been known

or used by others and was not in public use or on sale with his consent or allowance; that the said Frank J. Marshall thereupon on and the twelfth day of February, 1886, made application in the form prescribed by law praying that Letters Patent might be issued to him therefor, and did in other things comply with the statutes of the United States in such case made and provided and such proceedings were thereupon had, that the United States of America did issue its Letters Patent under the seal of the patent office serial No. 342,802 and bearing date of June first, 1886; whereby it granted according to law unto the said Frank J. Marshall, his heirs and assigns, full and exclusive right and liberty of making, constructing, using and vending to others to be used said improvement in refining engines, a description whereof was annexed to and made a part of said Letters Patent for the term of seventeen years from the date thereof, to which said Letters Patent, or a duly certified copy thereof, now here, ready to be produced, the plaintiff begs to refer."

*Ninth Allegation:*

"And the plaintiff further shows upon information and belief that subsequent to the issuing of the said Letters Patent first aforesaid, but prior to the fourteenth day of April, 1903, the said Frank J. Marshall had invented a certain further new and useful improvement in refining engines, which was an improvement on the invention or improved refining engine described in the specifications attached to the said Letters Patent first aforesaid, which had not previously been known or used by others, and was not in public use or on sale with his consent or allowance; that the said Frank J. Marshall thereupon and on the sixteenth day of July, 1902, made application in the form prescribed by law, praying that Letters Patent might be issued therefor, and did in other things comply with the statutes of the United States, in such case made and provided, and thereupon the United States of America did issue its Letters Patent under the seal of the patent office, serial No. 725,349 and bearing date of April 14, 1903, whereby it granted according to law unto the said Frank J. Marshall, his heirs and assigns, full and exclusive right and liberty of making, constructing and using, and vending to others to be used, the said improvement in refining engines, a description whereof is annexed to and made part of the said Letters Patent for the term of seventeen years from the date thereof to which said Letters Patent or a

certified copy thereof, now here ready to be produced, the plaintiff begs to refer."

*Tenth Allegation:*

"And the plaintiff further shows, upon information and belief, that on or about the eighth day of October, 1904, the said Frank J. Marshall, upon the request and at the cost of the said 'Marshall Engine Company,' and with the express intention and purpose of vesting absolutely in the said company, its successors and assigns, any and all patent rights and interests secured to the said company by the assignment hereinbefore referred to, marked Exhibit A, and more particularly speaking, any and all improvements at any time heretofore made by the said Frank J. Marshall upon the Letters Patent of the United States first aforesaid, and in and to any and all inventions of the said Frank J. Marshall, in any way relative to or connected with, the said refining engine known as the 'Marshall Perfecting Engine,' and such Letters Patent of the United States as might be issued therefor, duly assigned, by an instrument in writing, a copy of which is hereto annexed and made a part hereof, marked Exhibit B, to the said 'Marshall Engine Company,' its successors and assigns, all his right, title and interest in and to 'Letters Patent of the United States of America, for an improvement in refining engines, which Letters Patent are numbered 342,802, and all further improvements thereon and renewals of the same,' which said assignment was duly recorded in the Patent Office of the United States, at Washington, on the tenth day of October, 1904."

*Eleventh Allegation:*

"And the plaintiff further shows upon information and belief that the improvements as made by the said Frank J. Marshall, and for which the Letters Patent last aforesaid were issued to him, were improvements upon the said refining engine described in and secured to the said Frank J. Marshall, his heirs and assigns, by the Letters Patent first aforesaid and assigned to the said Marshall Engine Co., as aforesaid, and that the said Marshall Engine Co. by virtue of the assignments aforesaid, has the exclusive right to make, construct, use and vend such improvements and improved refining engines within the United States of America, and is entitled to an assignment of the same for such territory in the usual form."

To which the defendant answers as follows:

*Eighth Allegation:*

"The defendants admit the allegations contained in the eighth paragraph of the plaintiff's bill."

*Ninth Allegation:*

"The defendants deny the allegations contained in the ninth paragraph of the plaintiff's bill, except that the United States of America did issue its Letters Patent under the seal of the patent office serial No. 725,349, bearing date of April 14, 1903, as alleged, which we admit."

*Tenth Allegation:*

"As to the allegations contained in the tenth paragraph of the plaintiff's bill, the defendants neither affirm nor deny, but leave the plaintiff to prove the same."

*Eleventh Allegation:*

"The defendants deny the allegations contained in the eleventh paragraph of the plaintiff's bill."

Marshall Engine Co., of New Jersey, was incorporated September 13, 1902. On June 13, 1905, a receiver of the Marshall Engine Co., of New Jersey, was appointed by the courts of New Jersey for the purpose of demanding, suing for, collecting, preserving and taking into possession all the property, effects and choses in action of said company.

August 21, 1905, a decree appointing an ancillary receiver upon the filing of his bond was made by the Superior Court for Franklin County and the ancillary receiver filed his bond September 2, 1905.

New Marshall Engine Co., one of the defendants, was incorporated June 21, 1905.

Frank J. Marshall, on June 1, 1886, received from the United States Letters Patent No. 342,802 for an alleged new and useful improvement in pulp-beating engines; the patent expiring June 1, 1903.

E. R. Marshall received from the United States Letters Patent No. 411,251 for an alleged new and useful improvement in pulp-beating engines on September 17, 1889.

Frank J. Marshall applied for and received from the United States on the 14th day of April, 1903, Letters Patent No. 725,349 for an alleged new and useful improvement in pulp-beating engines, which was an improvement on patent No. 411,251 granted September 17, 1889, to E. R. Marshall and embodied features which were not patentable, but which were shown in patent No. 342,802, granted June 1st, 1886, to Frank J. Marshall.

On September 15, 1902, an agreement was drawn up between Frank J. Marshall and the Marshall Engine Co., of New Jersey, for the sale and transfer of patent No. 342,802 granted in 1886, and said Marshall was to receive therefor certain stock in said company; that said agreement never was delivered by said Marshall and never was recorded in the Patent Office at Washington; that on October 8, 1904, said Frank J. Marshall made an assignment of patent No. 342,802 granted to him in 1886 with all improvements thereon and all renewals of the same, said patent No. 342,802 having expired on June first, 1903; that on June 22, 1905, Frank J. Marshall made an assignment of patent No. 725,349 to the New Marshall Engine Co., a corporation organized under the laws of Massachusetts.

The claim of the Marshall Engine Co., of New Jersey, is based upon the assertion that patent No. 725,349 is an improvement on patent No. 342,802 granted to Frank J. Marshall in 1886.

The petitioner sets up a right under the patent laws as ground for a recovery, the case of the Marshall Engine Co., of New Jersey, being based upon the assertion that patent No. 725,349 is an improvement on patent No. 342,802, granted to Frank J. Marshall in 1886; and claims the exclusive right to make, construct, use and vend perfecting engines manufactured under patent No. 725,349, within the United States of America. And the principal redress asked for in its prayer is that the New Marshall Engine Company, its successors or assigns, or Frank J. Marshall, or both of them, may be enjoined and restrained from infringing on patent No. 725,349 throughout the United States of America.

The defendants claim that patent No. 725,349 is what it claims to be in said patent, an improvement upon said patent No. 411,251, granted to E. R. Marshall in 1889, and is, in fact, what is called a utility patent.

The defendants deny that the patent No. 725,349 is in fact

as well as in law, an improvement upon patent No. 342,802 granted in 1886 to F. J. Marshall.

### BRIEF OF THE FACTS

At the time of the incorporation of the Marshall Engine Co., of New Jersey, in 1902, Frank J. Marshall was carrying on the business of making pulp-beating engines, known as the Marshall Perfecting Engines, at Turners Falls, Massachusetts.

Shortly after the incorporation of said company, he turned over to said company, the business, which he had formerly been conducting, the making of the Marshall Perfecting Engines, and opened an office in New York City. The company had no factory. The business of the Marshall Engine Co., of New Jersey, was carried on as follows: orders for Marshall Engines would be solicited and received, and the Marshall Engine Co., upon the receipt of said orders, contracted with the Turners Falls Machine Co. at Turners Falls to manufacture said engines, and upon the machine being manufactured, the Marshall Engine Co. would receive the machine, if satisfactory, deliver it to the customer, who paid the Marshall Engine Co. for the same. That all engines for which orders were taken and which were sold and delivered by the Marshall Engine Co., of New Jersey, were made under the patent granted to Frank J. Marshall in 1886 and numbered 342,802. The Marshall Engine Co., of New Jersey, never solicited, ordered, made or handled in any way any pulp-beating engines made under the patent granted to Frank J. Marshall in 1903 and numbered 725,349 except upon royalties agreed to be paid to Frank J. Marshall.

That the books of the Marshall Engine Co., of New Jersey, show items of credit to Frank J. Marshall for royalties due him on account of engines made under patent No. 725,349.

The Marshall Engine Co., of New Jersey, ceased to transact any business in New York some time during November, 1904.

The Marshall Engine Co. manufactured a Marshall Engine with the improvements for which a patent was granted April 14, 1903, under patent No. 725,349, under a royalty paid to Frank J. Marshall; that on October 8, 1904, said Frank J. Marshall made an assignment of patent No. 342,802 granted to him in 1886 with all improvements thereon and renewals of the same, said patent

No. 342802 having expired on June 1, 1903; that said Marshall Engine, Co. was still manufacturing engines under patent No. 725,349 and in the assignment of October 8, 1904, which was duly recorded at the patent office at Washington, no mention or reference is made to said patent and nothing was said by any of the parties at the time whereby it was understood or expected that the assignment of patent No. 342,802 with all improvements and renewals would include patent No. 725,349. It was distinctly understood between the parties that patent No. 725,349 was for an alleged new and useful improvement on patent No. 411,251 granted to E. R. Marshall September 17, 1889, and was not at any time considered by the parties as or for an alleged improvement on account of patent No. 342,802 granted to Frank J. Marshall in 1886.

Patents for various makes of pulp-beating engines as well as sewing machines and watches are numerous.

It states specifically that it is an assignment of patent No. 342,802 granted to Frank J. Marshall in 1886 with all improvements and renewals of the same. The patent of April 14, 1903, granted to Frank J. Marshall for an alleged improvement on patent No. 411,251 granted to E. R. Marshall in 1889 shows distinctly what it is.

The court in order to decide the case must first decide a patent case and interpret the assignment given, under the United States Laws. The point or question in issue is on the interpretation of the inventions and the construction to be placed upon section 4898, R. L. U. S., and this question is not a collateral issue with the question of the validity of the contract, but is the main and only issue, and over such cases the United States Courts alone have jurisdiction.

This bill is based primarily on the allegations made by the plaintiff in the eighth, ninth, tenth and eleventh paragraphs of its bill, wherein it states that the patent granted to Frank J. Marshall in 1903 and numbered 725,349 is an improvement on the patent granted to said Marshall in 1886 and numbered 342,802, which allegation is expressly denied and issue taken thereon.

## LAW POINTS

### JURISDICTION

The United States courts shall have exclusive jurisdiction of all *Cases* arising under the patent-right and copyright laws of the United States.

U. S. Revised Laws, Chapter 12, Section 711; also  
U. S. Revised Laws, Sections 4884-4886.

### FIRST PROPOSITION

In allegation 9 of the plaintiff's bill the plaintiff alleges that the defendant, Frank J. Marshall, invented a certain valuable improvement in refining engines, which was an improvement upon the engine for which patent No. 342,802 was granted to said Marshall.

To the above allegation the defendants answer in denial, except that the United States of America did issue its Letters Patent under the seal of the Patent Office, serial No. 725,349, bearing date of April 14, 1903, as alleged, which they admit; one question here presented for your consideration is as to the construction to be given to the law governing the assignment under which the plaintiff claims title, which clearly makes it a case for the United States courts.

Littlefield vs. Perry. 21 Wall. 205.

This clearly puts in issue the nature and scope of the patent above referred to, and involves an inquiry into the nature and scope of the invention.

Aberthaw Construction Co. vs. Ernest L. Ransome,  
192 Mass. 434, 439.

### SECOND PROPOSITION

There is a clear distinction between a case and a question under the patent laws. The former arises when the plaintiff in

his opening pleading sets up a right under the patent laws as a ground for recovery.

Pratt vs. Paris Gaslight & Coke Co. 168 U. S. 255,  
at 257.

In paragraph 10 of the plaintiff's bill he sets up a right under a certain alleged assignment given in pursuance of Sec. 4898 of the R. L. of the United States, upon which allegation issue is joined.

If the assignee to a patent sets up his patent he thereby puts the title in issue, and even if it is denied by the defendant this does not make it a suit upon the contract, but it still remains a suit for infringement of a patent.

Excelsior W. P. Co. vs. Pacific Bridge Co. 185 U. S.  
291.

If the patent is involved it carries with it the whole case.

Excelsior W. P. Co. vs. Pacific Bridge Co. 185 U. S.  
282, at 292.

The character of a case is determined by the question involved. If it appears that some right will be defeated by one construction of an United States law, or sustained by an opposite construction of such law, a case thereby arises of which the United States courts alone have jurisdiction.

Pratt vs. Paris Gaslight & Coke Co. 168 U. S. 255.

Excelsior W. P. Co. vs. Pacific Bridge Co. 185 U. S.  
282-286.

Starin vs. New York. 115 U. S. 257.

### THIRD PROPOSITION

In paragraph 11 the plaintiff alleges that certain improvements made by the defendant, Frank J. Marshall, and for which Letters Patent, No. 725,349, were issued to him, and which purports to be an improvement upon a certain patent, No. 411,251, granted to E. R. Marshall, September 17, 1889, were improvements upon an engine, for which patent No. 342,802 was issued to the defendant, Frank J. Marshall, of which patent No. 342,802 the plaintiff has an assignment.

To the above allegation the defendants deny said allegation, and issue is joined, which brings in issue the question of the title to said patent No. 725,349, and also makes it necessary to go into the nature and scope of the engines covered by said patent, and in such cases the United States courts alone have jurisdiction.

Aberthaw Construction Co. vs. Ernest L. Ransome,  
192 Mass. 434, at 439.

To determine as to whether this patent is an improvement upon the other it is necessary to inquire whether the improvement in controversy, for which Letters Patent No. 725,349 was issued, of which an assignment is claimed under an assignment of patent No. 342,802, is infringed upon by the defendant making said improvements. This involves the construction of patents, and the United States courts alone have jurisdiction.

Littlefield vs. Perry. 21 Wall. 205, at 219.

#### FOURTH PROPOSITION

Sec. 4898. "Every patent or interest therein shall be assignable in law, by an instrument in writing; and the patentee or his assigns or legal representatives may, in like manner, grant and convey an exclusive right under his patent to the whole or any specified part of the United States. An assignment, grant, or conveyance shall be void as against any subsequent purchaser or mortgagee for a valuable consideration, without notice, unless it is recorded in the Patent Office within three months from the date thereof."

Revised Laws. Sec. 4898.

The plaintiff claims in paragraph 10 of his bill, title to patent No. 725,349 under an assignment of patent No. 342,802 given by Frank J. Marshall on October 8, 1904, which patent had expired June 1, 1903.

The defendants neither admit nor deny this allegation, but leave the plaintiff to prove it. Thereby the question is clearly raised whether said Sec. 4898 shall be construed to mean patents which have expired, with the improvements thereon, clearly

making a case of which the United States courts alone have jurisdiction.

### INFRINGEMENTS

The plaintiff in his prayer asks for relief by having the defendants enjoined from infringing upon patent No. 725,349. This again clearly makes this a case arising under the patent laws.

Excelsior W. P. Co. vs. Pacific Bridge Co. 185 U. S. 282, at 291.

To determine whether an injunction shall issue as prayed for it is necessary to inquire whether there has been an infringement, and that involves the construction of patents.

It is well established that assignees may sue in the United States courts for infringements.

Littlefield vs. Perry. 21 Wall. 205, at 219.

An injunction against future infringements is prayed for in this case, and thereby arises a case under the patent laws.

Excelsior W. P. Co. vs. Pacific Bridge Co. 185 U. S. 282, at 291.

In allegation 11 the plaintiff claims that by Letters Patent first aforesaid, No. 342,802, and assigned to the Marshall Engine Co., as aforesaid, that said Marshall Engine Co., by virtue of the assignments aforesaid, has the exclusive title and right to make, use, and vend the improvements under patent No. 725,349 within the United States of America, and the prayer of the plaintiff for an injunction is for the purpose of preventing the defendants from infringing on said patent.

Can it be said that a state court can issue an injunction imposing such restraint as is here asked for, protecting the plaintiff in making, using, vending in the United States?

Does not this make the defendants liable to a succession of suits in each State?

The master, on page 16 of his report as printed, finds that

patent No. 725,349 is an improvement on the engine described in Letters Patent No. 342,802, basing his finding upon evidence of the nature and scope of the patent.

See page 16 of his report as printed.

Even if the complaint standing by itself makes out a case of jurisdiction, it will be taken away if the answer sets up a case of a right under the patent laws.

Robinson vs. Anderson. 121 U. S. 522.

Excelsior W. P. Co. vs. Pacific Bridge Co. 185 U. S. 282, at 287, 288.

This bill clearly and distinctly puts in issue:

*First.* The title of the plaintiff which is claimed by an assignment from one of the defendants.

*Second.* The validity of the patent.

*Third.* An infringement. And prays for an injunction to prevent an infringement.

The answer raises an issue on all three of the foregoing allegations, and thereby arises a case under the patent laws.

Excelsior W. P. Co. vs. Pacific Bridge Co. 185 U. S. 282, 292.

A suit in which the relief sought is an injunction against infringing on a patent is one arising under the patent laws of the United States, although it incidentally involves a determination of the question of the ownership of the patent.

Atherton Machine Co. vs. Atwood-Morrison Co. 102 Fed. Rep. 949.

Excelsior W. P. Co. vs. Pacific Bridge Co. 185 U. S. 282, at 294.

The remedy sought involves the right of the defendant to

use the patent, in other words, it is a suit for infringement, of which the Federal courts alone have jurisdiction.

Excelsior W. P. Co. vs. Pacific Bridge Co. 185 U. S. 282, at 294, 295.

Cases arising under the laws of the United States, are such as grow out of the legislation of Congress, whether they constitute the right or privilege, or claim or protection, or defense of the party, in whole or in part, by whom they are asserted.

Tennessee vs. Davis. 100 U. S. 257, at 264.

Story on the Constitution. Sec. 1647.

Cohens vs. Virginia. 6 Wheat. 82.

Peutz, Jr. vs. Bransford. Bransford vs. Peutz, Jr. 32 Fed. Rep. 318.

White vs. Rankin. 144 U. S. 628.

Adriance Pratt & Co. vs. McCormick Harvesting Machine Co. 55 Fed. Rep. 256.

Walter A. Wood Harvester Co. vs. Minneapolis-Easterly Harvester Co. 61 Fed. Rep. 256.

Young Reversible Lock-Nut Co. vs. Young Lock-Nut Co. et al. 72 Fed. Rep. 60.

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No. 107

THE NEW MARSHALL ENGINE COMPANY

AND

FRANK J. MARSHALL

PLAINTIFF IN ERROR

vs.

THE MARSHALL ENGINE COMPANY

BY

ANDREW VAN BLARCOM, ITS RECEIVER

IN ERROR TO THE SUPERIOR COURT OF MASSACHUSETTS

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1911

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Supreme Court of the United States.

OCTOBER TERM, 1911.

No. 107.

Office Supreme Court, U. S.  
FILED,

DEC 8 1911

JAMES H. McKENNEY,  
CLERK

THE NEW MARSHALL ENGINE COMPANY  
AND FRANK J. MARSHALL,  
*Plaintiffs in Error,*

vs.

THE MARSHALL ENGINE COMPANY, by  
ANDREW VAN BLARCOM, Its Receiver,  
*Defendant in Error.*

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BRIEF.

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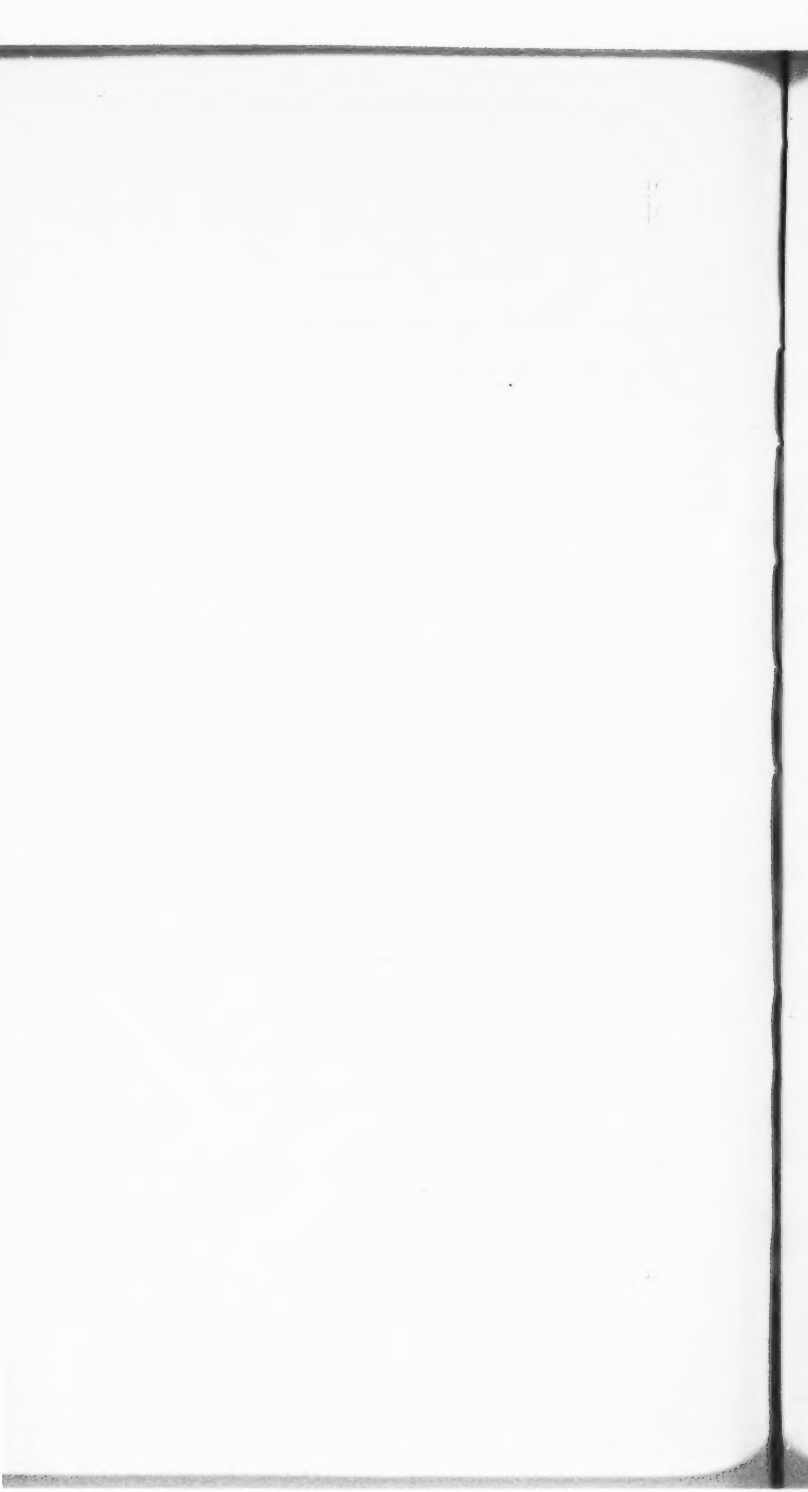
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# SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1911.

THE NEW MARSHALL ENGINE COM-  
PANY and FRANK J. MARSHALL,  
Plaintiffs In Error,

AGAINST

THE MARSHALL ENGINE COMPANY,  
by ANDREW VAN BLARCOM, its re-  
ceiver,  
Defendant In Error.

No. 107.

## STATEMENT.

This is a suit brought by the Receiver of the Marshall Engine Company to compel the assignment to it of United States Letters Patent, No. 725,349, for an improvement in pulp-beating engines.

The plaintiff in error, Frank J. Marshall, was granted Letters Patent, No. 348,802, for an improvement in pulp-beating engines, on June 1st, 1886 (Fol. 41). On September 15th, 1902, he entered into a written contract (Ex. A.), with the Marshall Engine Company, the defendant in error, wherein and whereby he sold to the said company the said patent, "and all improvements thereon and renewals of the same," and "interests to which the vendor is entitled in connection with such business. \* \* \* Also all other

property and rights of whatsoever nature or kind used by the vendor in its said business." (Fol. 42). *At the time of the execution of the said agreement the said Frank J. Marshall (1) had pending an application for an improvement in pulp-beating engines, on which the said Letters Patent, No. 725,349, were issued in 1903 (Fol. 42), and (2) had already manufactured four engines thereunder (Fol. 43). That on the 8th day of October, 1902 (one year and four months after Letters Patent #342,802 had expired), the said Frank J. Marshall, at the request of the said Marshall Engine Company, executed and delivered to it an assignment, in pursuance of a covenant of further assurance contained in the said agreement of September 15th, 1902, which said assignment was duly recorded in United States Patent Office at Washington, on the 10th day of October, 1902. (Fol. 45).*

That between the 15th day of September, 1902, and the 13th day of June, 1905, at which time a receiver of the said Marshall Engine Company was appointed, the said Marshall Engine Company manufactured between nine and ten engines under the said Letters Patent, No. 725,349. (Fol. 43.)

That on or about the 21st day of June, 1905, the said Frank J. Marshall incorporated the plaintiff in error, the New Marshall Engine Company, under the laws of Massachusetts, and on or about the 22nd day of June, 1905, purported to assign Letters Patent, No. 725,349, to the said corporation. (Fol. 44.)

That on the 6th day of April, 1907, the said

Frank J. Marshall and New Marshall Engine Company, moved to dismiss this suit upon the ground of lack of jurisdiction, claiming that the questions raised were cognizable only in the United States Courts. (Fol. 53.) The said motion was overruled in the Superior Court of Massachusetts (Fol. 54), and, on appeal, its decree was affirmed by the Supreme Court of Massachusetts (Fol. 72), and it is from this judgment that the said plaintiffs in error have appealed to this Court.

### FIRST POINT.

THE STATE COURTS HAD JURISDICTION OF THE CASE AT BAR, INASMUCH AS IT WAS MERELY AN ATTEMPT TO ENFORCE RIGHTS ARISING EX CONTRACTU.

In the case of *Victor Talking Mach. Co. v. The Fair*, 123 Fed., 424, the Circuit Court of Appeals said:

“Concerning jurisdiction: When a contract is made respecting a right under a patent, and the parties get into litigation, confusion has sometimes arisen over the question whether the cause of action originates in the contract, or in the patent laws. The test is this: If the plaintiff is seeking a judgment for debt or damages, or a decree for cancellation *or specific performance, on account of the defendant's breach of his covenants, the cause of action arises out of the contract*; and, though the determination of issue of breach or no breach may involve the interpretation of the patent and of the prior act, the insistence of the defendant that his device, according to the true con-

struction of the patent and of the prior act, is not within the patent right granted him in the contract, cannot change the nature of the action."

This is a suit for the specific performance of an agreement (Ex. A.), dated the 15th day of September, 1902, and entered into between the Marshall Engine Company, the defendant in error, and Frank J. Marshall, the plaintiff in error, and arises on account of the breach by the said Frank J. Marshall of his covenants in the said agreement contained, to wit: to transfer to the said Marshall Engine Company, Letters Patent No. 725,749.

It is well settled that "where a suit is brought on a contract of which a patent is the subject matter, either to enforce such contract or to annul it, the case arises on the contract or out of the contract and not under the patent-right laws of the United States."

Wade v. Lawder, 165 U. S., 624.

It is equally well settled that if the invalidity of a patent is incidentally drawn in question in a cause properly cognizable in a State court, the jurisdiction of that court is not thereby ousted.

Pratt v. Paris Gas Light & Coke Co.,  
168 U. S., 255.

Actions to compel the specific performance of contracts where the question was whether the improvement for which letters patent were issued is an improvement on a former improvement, have been somewhat common in the State Courts, and no question seems to have been raised as to the jurisdiction of those courts.

See

McFarland *v.* Stanton Mfg. Co., 53 N. J. Eq., 649.

Biskey Mfg. Co. *v.* Jones, 71 Conn., 113.

Harris *v.* Wallace Mfg. Co., 95 N. E. (Ohio), 559.

Bates Machine Company *v.* Bates, 192 Ill., 138.

## SECOND POINT.

INASMUCH AS THE EQUITABLE TITLE TO LETTERS PATENT NO. 725,349 PASSED BY THE AGREEMENT OF SEPTEMBER 15TH, 1902, IRRESPECTIVE OF THE QUESTION AS TO WHETHER LETTERS PATENT, NO. 725,349 ARE AN IMPROVEMENT ON LETTERS PATENT NO. 342,802, IT IS NOT NECESSARY TO FIND THAT LETTERS PATENT NO. 725,349 ARE AN IMPROVEMENT ON LETTERS PATENT, NO. 342,802, IN ORDER TO AFFIRM THE JUDGMENT OF THE SUPREME COURT OF MASSACHUSETTS; AND THE STATE COURTS HAD UNQUESTIONABLE JURISDICTION OF THE SUIT TO ENFORCE THE SPECIFIC PERFORMANCE OF THE SAID AGREEMENT.

In Exhibit A, attached to the complaint, the plaintiff in error, Frank J. Marshall, bound himself to assign to the Marshall Engine Company, the defendant in error, (1) "United States Letters Patent No. 342,802, for an improvement in Engines issued to Frank J. Marshall, June 1st, 1886, and all improvements thereon and renewals of the same," (2) and "interests in which the vendor is entitled in connection with such business" \* \* \* and "all other property

and rights of whatsoever nature or kind used by the vendor in its said business."

Leaving out of consideration the said clause (1), which we have already considered, *the question is whether under the said clause (2) the parties intended to include Letters Patent No. 725,349.*

As was well said by the Supreme Court of Connecticut in a somewhat similar case (*Biskey Mfg. Co. v. Jones*, 71 Conn., 113):

"It is not enough that they intended to include them. They must also have expressed that intention in the agreement, but, in determining whether they have expressed such an intention, the agreement may be read in the light of the facts and circumstances under which it was made, as disclosed upon the record."

When the said agreement is so read we respectfully submit that under the said clause (2) it includes the said Letters Patent No. 725,349.

The record shows the following facts: that on the 1st day of June, 1886, the said Frank J. Marshall, was granted United States Letters Patent No. 342,802, for an improvement in pulp-beating engines (Fol. 41); that from the year 1887, to on or about the 15th day of September, 1902, the said Frank J. Marshall was engaged in the business of manufacturing, buying, selling and otherwise dealing in and with a pulp-beating engine manufactured under the said patent by the name of "Marshall Perfecting Engine" (Fol. 42); that on or about the 13th day of September, 1902, the said Frank J. Marshall incorporated the said Marshall Engine Company under the laws

of the State of New Jersey (admitted by answer), and was on the 15th day of September, 1902, elected a director thereof, and was on the 17th day of September, 1902, elected the treasurer thereof (Fol. 42); that on the 15th day of September, 1902, the said Frank J. Marshall entered into the said written agreement with the said Marshall Engine Company (Ex. A), (Fol. 42); that the said agreement shows that the *first property* therein transferred was the said Letters Patent No. 342,802, and that the *second property* therein transferred was the good-will of the business carried on by the said Frank J. Marshall, the head-office being located at #309 Broadway, New York City; *that at the time of the execution of the said agreement, the said Frank J. Marshall had no patents except Patent No. 342,802, and no plant, machinery, furniture, licenses or stock in trade; that the said Frank J. Marshall had copy books, cash books and ledger, and some debts due to him, and, that he had pending, an application for a patent for an improvement in pulp-beating engines, on which application United States Letters Patent No. 725,349 was issued in 1903 (Fol. 42); that prior to the execution of the said agreement four engines had been manufactured embodying the improvement described in the patent of 1903 (Fol. 43); that the said Frank J. Marshall, and his nominees, received from the said Marshall Engine Company, in consideration of the transfer of the said property and rights, common stock of the said Marshall Engine Company of the par value of Forty-Five Thousand Dollars (\$45,000) (Fol. 43); that between Septem-*

ber 15th, 1902, and June 13th, 1905, at which time a receiver of the said Marshall Engine Company was appointed, either nine or ten engines embodying the improvement described in Letters Patent, No. 725,349, were manufactured by the said Marshall Engine Company (Fol. 43); that on the 8th day of October, 1904, and at the request of other parties interested in the said Marshall Engine Company, the said Frank J. Marshall executed and acknowledged the paper annexed to the complaint marked "B," which was duly recorded in the United States Patent Office October 10th, 1904 (Fol. 45); and that Letters Patent No. 342,802 and Letters Patent No. 725,349 are both for improvements in pulp-beating engines (Fol. 46).

"It must be treated as settled that before the granting of a patent, an inventor has a qualified property in his invention which is assignable."

Burton v. Burton Stock Car Co., 171 Mass., 437,438, and cases cited.

Cook v. Sterling Electric Co., 118 Fed., 45.

In the case of Railroad Company v. Trimble, 10 Wall., 367, this Court held that a deed by which a party conveyed "*all his property and estate, whatsoever and wheresoever, of any kind and description,*" carried any and all *patent rights* and extensions owned by the party at the time of the execution of the instrument.

And we submit that inasmuch as the said pending application upon which Letters Patent No. 725,349 were granted in 1903, was for an im-

provement in pulp-beating engines, and inasmuch as four engines had been manufactured thereunder prior to the said agreement of September 15, 1902, *the said pending application was "property and rights" within the meaning of the said clause (2).*

And this is borne out by the construction put upon the said agreement by the said Marshall Engine Company and Frank J. Marshall, up to the time of the appointment of the receiver on June 13th, 1905, it appearing that during that time, nine or ten engines were manufactured by the said Marshall Engine Company under the said Letters Patent, No. 725,349.

In the case of *Topliff v. Topliff*, 122 U. S., 121, this Court said:

"The operations of the parties in the manufacture and sale of the article were carried on, and continued to enlarge and prosper, and became profitable; and the parties throughout acted upon the assumption and understanding that the article they manufactured was the article contemplated by the contract between them. If there were any doubt or ambiguity arising upon the words employed in the clause of the contract under consideration, they would be effectually removed by this practical construction continuously put upon them by the conduct of the parties for so long a period.

*In cases where the language used by the parties to the contract is indefinite or ambiguous, and hence of doubtful construction, the practical interpretation of the parties is entitled to great, if not controlling influence."*

And this is further borne out by the fact that

on the 8th day of October, 1904 (one year and four months after Letters Patent No. 342,802 had expired), the said Frank J. Marshall, at the request of the said Marshall Engine Company, executed and delivered to the said Marshall Engine Company, an assignment (Ex. B, annexed to the complaint) in pursuance of a covenant of further assurance contained in the said agreement of September 15th, 1902, which said assignment was duly recorded in the United States Patent office on the 10th day of October, 1904.

And in this connection we further submit that all of the allegations in Paragraph X of the complaint contained, are admitted by Paragraph 10 of the answer, *in that the defendants did not declare their ignorance so that they "could neither admit nor deny the same."*

Haines v. Ryder, 100 Mass., 216.

We submit that to hold that the equitable title to Letters Patent, No. 725,349 did not pass to the said Marshall Engine Company by reason of the said agreement of September 15th, 1902, would be to hold that the only property transferred was Letters Patent No. 342,803, which were to expire on June 1st, 1903; and that the said Frank J. Marshall was to receive capital stock of the par value of Forty-five Thousand Dollars (\$45,000) therefor.

We further submit that if the equitable title to Letters Patent, No. 725,349, passed by reason of the said agreement, the suit at bar "arises on the contract or out of the contract," and that the

State Courts had unquestionable jurisdiction thereof.

Wade v. Lauder, 165, U. S., 624.

### THIRD POINT.

IT IS RESPECTFULLY SUBMITTED THAT THE JUDGMENT OF THE SUPREME COURT OF MASSACHUSETTS SHOULD BE AFFIRMED, WITH COSTS.

WALTER H. BOND,  
Attorney for Defendant In Error,  
32 Broadway,  
New York City.

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NEW MARSHALL ENGINE COMPANY *v.* MAR-  
SHALL ENGINE COMPANY.

ERROR TO THE SUPERIOR COURT OF THE STATE OF  
MASSACHUSETTS.

No. 107. Submitted December 15, 1911.—Decided February 19, 1912.

The Federal courts have exclusive jurisdiction of all cases arising under the patent laws, but not of all questions in which a patent may be the subject-matter of the controversy.

Courts of a State may try questions of title and construe and enforce contracts relating to patents. *Wade v. Lawder*, 165 U. S. 624.

A suit, to compel assignment of a patent and to enjoin manufacturing and sale of articles covered thereby, because the patent is an improvement on an earlier one and included in a covenant to convey all such improvements, is based on general principles of equity, and is within the jurisdiction of the state court.

Where the injunction granted against sale of articles manufactured under a patent is only an incident to a decree for specific performance of a contract to convey the patent as an improvement of an earlier one, the relief is appropriate, and, if it does not determine questions of infringement, is within the jurisdiction of the state courts.

203 Massachusetts, 410, affirmed.

On June 1, 1886, Letters Patent 342,802, were issued to Frank J. Marshall for an improvement in Pulp Beating Engines. Shortly before the patent expired he organized the Marshall Engine Company, and on September 15, 1903, assigned to it the patent and "all improvements thereon and renewals of the same." Marshall was elected president of the company, but neglected to have the assignment recorded within the time required by law. It contained, however, a provision for further assurance, and on October 8, 1904, after the patent had expired, Marshall executed an additional instrument whereby, after reciting the former assignment, he transferred the patent and "all further improvements thereon and renewals thereof."

In September, 1903, at the time the first assignment was made, Marshall had on file an application for a patent on "an improvement on patent 411,251 granted to E. R. Marshall, and embodies features shown in patent 342,802, granted in 1886 to myself." There is no further reference in the record to patent 411,251. Marshall's application was granted, and on April 14, 1903, Letters Patent 725,349 were granted to him.

No formal assignment was made, but it is found as a fact that, between September 15, 1903, and the receivership, the complainant manufactured nine or ten engines embodying the improvement covered by patent 725,349.

On June 13, 1905, a receiver was appointed for the Marshall Engine Company. Immediately thereafter, Marshall organized under the laws of Massachusetts a new company bearing his name, and assigned to it this patent 725,349. The New Marshall Engine Company took with notice of the complainant's right.

The Marshall Engine Company, of New Jersey, claimed title to this patent 725,349 as an "Improvement" on patent 342,802, which passed by virtue of the assignment of September 15, 1903. It thereupon filed, through its receiver, a bill in the Superior Court of Franklin County, Massachusetts, asserting this title and praying that the defendants, Marshall and the New Marshall Engine Company, should be required to execute and deliver to it an assignment in due form to patent 725,349, so as to entitle it to be recorded in the Patent Office, and also that the defendants, their successors and assigns, should be enjoined from manufacturing or selling machines covered by patent 725,349.

The defendants answered, admitting or denying the several allegations of the bill, but setting up no affirmative defense. The case was referred to a Master, who found in favor of the complainant. Thereupon the defendant moved to dismiss the bill because "it presents questions involving an inquiry as to the construction and scope of the patents therein mentioned, of which questions the Federal courts have exclusive jurisdiction." The motion was overruled, and a final decree was entered in favor of the complainants. The decision was affirmed by the Supreme Judicial Court of Massachusetts, and the case was brought here by writ of error.

*Mr. Edmund A. Whitman, Mr. Lyman W. Griswold and Mr. Frank J. Lawler, for plaintiffs in error:*

The United States courts have exclusive jurisdiction of all cases arising under the patent-right and copyright

laws of the United States. Revised Stats., c. 12, § 711; Rev. Stat., §§ 4884-4886.

Plaintiff's bill alleges that defendant, Marshall, invented a certain valuable improvement in refining engines, which was an improvement upon the engine for which patent No. 342,802 had been granted to him.

One question here presented is as to the construction to be given to the law governing the assignment under which the plaintiff claims title, which clearly makes it a case for the United States courts. *Littlefield v. Perry*, 21 Wall. 205.

This puts in issue the nature and scope of the patent above referred to, and involves an inquiry into the nature and scope of the invention. *Aberthaw Const. Co. v. Ransome*, 192 Massachusetts, 434, 439.

There is a clear distinction between a case and a question under the patent laws. The former arises when the plaintiff in his opening pleading sets up a right under the patent laws as a ground for recovery. *Pratt v. Paris Gaslight & Coke Co.*, 168 U. S. 255.

If the assignee of a patent sets up his patent he thereby puts the title in issue, and even if it is denied by the defendant this does not make it a suit upon the contract, but it still remains a suit for infringement of a patent, and if the patent is involved it carries with it the whole case. *Excelsior W. P. Co. v. Pacific Bridge Co.*, 185 U. S. 291.

The character of a case is determined by the question involved. If it appears that some right will be defeated by one construction of an United States law, or sustained by an opposite construction of such law, a case thereby arises of which the United States courts alone have jurisdiction. Cases *supra* and *Starin v. New York*, 115 U. S. 257.

The issue as joined brings in issue the question of the title to a patent, and also makes it necessary to go into

the nature and scope of the engines covered by said patent, and in such cases the United States courts alone have jurisdiction. *Aberthaw Construction Co. v. Ransome*, 192 Massachusetts, 434, at 439; *Littlefield v. Perry*, 21 Wall. 205, at 219.

The plaintiff in his prayer asks for relief by having the defendants enjoined from infringing upon a patent, and this makes it a case arising under the patent laws; cases *supra*.

A state court cannot issue an injunction imposing such restraint as is here asked for, protecting the plaintiff in making, using, or vending in the United States.

It would make the defendants liable to a succession of suits in each State.

Even if the complaint standing by itself makes out a case of jurisdiction, it will be taken away if the answer sets up a case of a right under the patent laws. *Robinson v. Anderson*, 121 U. S. 522; *Excelsior W. P. Co. v. Pacific Bridge Co.*, 185 U. S. 282, 287.

A suit in which the relief sought is an injunction against infringing a patent is one arising under the patent laws of the United States, although it incidentally involves a determination of the question of the ownership of the patent. Cases *supra*, and *Atherton Machine Co. v. Atwood-Morrison Co.*, 102 Fed. Rep. 949.

Cases arising under the laws of the United States are such as grow out of the legislation of Congress, whether they constitute the right or privilege, or claim or protection, or defense of the party, in whole or in part, by whom they are asserted. *Tennessee v. Davis*, 100 U. S. 257, at 264; Story on the Constitution, § 1647; *Cohens v. Virginia*, 6 Wheat. 82; *Peutz v. Bransford*, 32 Fed. Rep. 318; *White v. Rankin*, 144 U. S. 628; *Adriance Pratt & Co. v. McCormick Harvesting Co.*, 55 Fed. Rep. 256; *Wood Harvester Co. v. Minneapolis Harvester Co.*, 61 Fed. Rep. 256; *Reversible Lock-Nut Co. v. Lock-Nut Co.*, 72 Fed. Rep. 60.

*Mr. Walter H. Bond* for defendant in error:

The state courts had jurisdiction of the case at bar, inasmuch as it was merely an attempt to enforce rights arising *ex contractu*. *Victor Talking Machine Co. v. The Fair*, 123 Fed. Rep. 424; *Wade v. Lawder*, 165 U. S. 624; *Pratt v. Paris Gaslight & Coke Co.*, 168 U. S. 255. See *McFarland v. Stanton Mfg. Co.*, 53 N. J. Eq. 649; *Biskey Mfg. Co. v. Jones*, 71 Connecticut, 113; *Harris v. Wallace Mfg. Co.*, 95 N. E. Rep. (Ohio) 559; *Bates Machine Company v. Bates*, 192 Illinois, 138.

Inasmuch as the equitable title to certain letters patent passed by the agreement of September 15, 1903, irrespective of whether those letters are an improvement on a former patent, it is not necessary to find that the former are an improvement on the latter, in order to affirm the judgment of the state court; and the state courts had unquestionable jurisdiction of the suit to enforce the specific performance of the said agreement.

It must be treated as settled that before the granting of a patent, an inventor has a qualified property in his invention which is assignable. *Burton v. Burton Stock Car Co.*, 171 Massachusetts, 437; *Cook v. Sterling Electric Co.*, 118 Fed. Rep. 45; *Topliff v. Topliff*, 122 U. S. 121; *Haines v. Ryder*, 100 Massachusetts, 216.

MR. JUSTICE LAMAR, after making the foregoing statement, delivered the opinion of the court.

The Federal courts have exclusive jurisdiction of all cases arising under the patent laws, but not of all questions in which a patent may be the subject-matter of the controversy. For courts of a State may try questions of title, and may construe and enforce contracts relating to patents. *Wade v. Lawder*, 165 U. S. 624, 627. The present litigation belongs to this class. The controlling fact for determination here is whether patent 725,349 belongs to the

Marshall Engine Company, of New Jersey, or to the New Marshall Engine Company, of Massachusetts. The complainant did not, by its bill in the state court, raise any question as to the validity or construction of the patent, nor did it make any claim for damages for infringement. The suit was an ordinary bill for specific performance to compel Marshall to assign to complainant the improvement on patent 342,702, in compliance with his covenant for further assurance. If patent 725,349 was an improvement thereon, as on the face of the application and letters-patent it appeared to be, then the complainant was entitled to a decree requiring Marshall to make a conveyance which could be properly recorded for the protection of the true owner.

Marshall had, however, in violation of his contract, previously assigned patent 725,349 to the New Marshall Engine Company, which took with notice of the prior transfer. This company, therefore, held the legal title as trustee for the complainant. Under the circumstances the state court had jurisdiction to pass on the question of ownership, and to enter a decree requiring Marshall, as patentee, and the New Marshall Engine Company, as trustee, to make an assignment in due form to the complainant. This jurisdiction was based on general principles of equity jurisprudence, and did not present a case arising under the patent law.

It is, however, urged that the state court was ousted of the jurisdiction to enter a decree for specific performance, because the bill went farther and prayed that the defendants, and each of them, should be enjoined from manufacturing or selling the machines covered by patent 725,349. It is claimed that this was, in effect, an application and decree for injunction against infringement, and could only be granted by a Federal court.

But the allegations of the complainant's bill do not involve any construction of the meaning or effect of pat-

ent 725,349, nor does it charge that the manufacture or sale of engines by the defendants would be an infringement of the patent, or of any right of the complainant, if, in fact, patent 725,349 belonged to the New Marshall Engine Company. The injunction was asked for only as an incident of a finding that the title was vested in the complainant. "The bill must be regarded and treated as a proceeding to enforce the specific execution of the contract referred to, and not as one to protect the complainants in the exclusive enjoyment of the patent right. . . . It is to prevent the fraudulent violation of these contracts that the complainants seek the aid of the court and ask for an injunction." *Brown v. Shannon*, 20 How. 56, 57. As said in *Wilson v. Sanford*, 10 How. 99, 102, "the injunction is to be the consequence of the decree sanctioning the forfeiture. He alleges no ground for an injunction unless the contract is set aside." Here the injunction asked for is to be the consequence of the decree sustaining the complainant's title. It alleges no ground for injunction unless that title is established.

The state court had jurisdiction of the subject-matter of the controversy. The relief granted was appropriate to the cause of action stated in the bill. The decree must therefore be

*Affirmed.*